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TRANSCRIPT OF RECORD

Supreme Court of the United States

October Term, 1964

No. 256

BILLIE SOL ESTES, PETITIONER,

TEXAS.

**ON WRIT OF HABEAS CORPUS TO THE COURT OF
CRIMINAL APPEALS OF TEXAS**

PETITION FOR HABEAS CORPUS FILED JULY 7, 1964

HABEAS CORPUS GRANTED DECEMBER 7, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 256

BILLIE SOL ESTES, PETITIONER,

vs.

TEXAS.

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS

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[fol. 1]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

THE STATE OF TEXAS,

VS.

BILLIE SOL ESTES.

[fol. 2]

INDICTMENT—Filed July 20, 1962

In the Name and by the Authority of the State of Texas:

The Grand Jurors, duly selected, organized, sworn and impaneled as such for the County of Reeves, State of Texas, at the May A. D. 1962 Term, of the 143rd Judicial District Court for said County, upon their oaths present in and to said Court that Billie Sol Estes on or about the 2nd day of March, 1961, in the County and State aforesaid, by means of false pretenses and devices and fraudulent representations then and there knowingly and fraudulently made by him to T. J. Wilson, did induce the said T. J. Wilson to sign and place his, the said T. J. Wilson's, signature on an instrument of writing, and did induce the said T. J. Wilson to deliver to him, the said Billie Sol Estes, and the said Billie Sol Estes did then and there, and by the means aforesaid, obtain possession of and acquire from the said T. J. Wilson, said instrument of writing with said signature affixed thereto conveying and securing a valuable right, the said instrument being of the tenor following:

Michigan, Missouri and Texas

CHATTEL MORTGAGE

C I T
Corporation

ORIGINAL FOR
FILING OR RECORDING

2.

(Do not use this form in any transaction covering motor vehicles in a state prescribing a special contract form therefor)

This Form is Subject to State Legal Requirements Buyer's (Mortgagor's) Name T. J. WILSON Dated: MARCH 2, (MONTH, DAY)

196, Street Address 1101 SOUTH PLUM City Pecos County of REEVES State TEXAS

(Where filing is governed by residence and equipment is in same state show (a) for corporation, its principal [fol. 3] office stated in its charter, (b) for partnership, its business address and, in the space at the right here of the name and residence address of each Partner, and (c) for individual, his residence address. Otherwise, show business address of buyer.)

To SUPERIOR MANUFACTURING COMPANY

(NAME OF SELLER-MORTGAGEE)

4110 NORTHEAST EIGHTH AVENUE

(STREET ADDRESS OF SELLER-MORTGAGEE)

AMARILLO TEXAS

(CITY) (STATE)

The above-named Mortgagor, meaning all Mortgagors jointly and severally, having been quoted both a time and a cash price, hereby purchases from you, on a time price basis, the following described personal property, together with all attachments, replacements, substitutions and additions, hereinafter referred to as "equipment":

(Describe equipment fully including make, kind or unit, serial and model numbers and any other pertinent information)

75-500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH

75-4 WHEEL SUPERIOR TANKS COMPLETE WITH TIRES, AXLES, WHEELS AND HOSE ASSEMBLIES.

SERIAL No's. SF-17214-500 THRU SF-17288-500

65—SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULA-
TORS, SHANKS, KNIVES, HOSES, AND 65—200 GALLON
NH3 TANKS.
TANK SERIAL No's. 8304 THRU 8368.

for which Mortgagor agrees to pay you or your assigns
\$121,850.00 of which \$27,350.00 has been paid and \$—0—
(FULL TIME PRICE) (DOWN PAYMENT)
is to be paid upon (installation) and \$94,500.00 as balance
(delivery) (BALANCE)
of purchase price is payable in 60 successive, monthly in-
(INSERT NUMBER OF MONTHS)
[fol. 4] stalments of \$1,575.00 each, and one final instal-
(AMOUNT OF EACH PAYMENT)
ment of \$—0—, commencing April-15, 1961, and then on a
(MONTH, DAY)
like date of each month thereafter until fully paid.

Interest shall be payable monthly on unpaid balances at
the rate of xxxx% per annum and after maturity at the
highest lawful contract rate. All payments are due at C.I.T.
Corporation's office, New York, Chicago or San Francisco.
If any note is taken herewith, it shall evidence indebtedness,
only and not payment. In consideration of said purchase
and to secure the above-described balance. Mortgagor here-
by grants, bargains, sells, conveys, confirms and mortgages
unto Mortgagee all of said equipment;

TO HAVE AND TO HOLD said equipment unto Mortgagee and
Mortgagee's sole use forever. Mortgagor covenants that
Mortgagor lawfully possesses said equipment and owns it
unencumbered and will warrant and defend said equipment
against all claims and demands of all persons.

Said equipment shall be kept at; No. 1401 SOUTH PLUM,
(STREET ADDRESS)

City of PECOS, County of REEVES, State of TEXAS, but shall
remain personal property and not become part of the free-
hold.

PROVIDED, NEVERTHELESS, that if Mortgagor pays Mort-
gagee said balance in money, as stated above, this mortgage
shall be void, otherwise to remain in full force and effect.

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AND PROVIDED FURTHER, that Mortgagor may retain possession of said equipment until any default hereunder.

Mortgagor agrees: to procure forthwith and maintain fire insurance with extended or combined additional coverage on the equipment for the full insurable value thereof for the life of this mortgage plus other insurance thereon in amounts and against such risks as you or assigns may specify, and promptly deliver each policy to you or assigns with a standard long form endorsement attached thereto showing loss payable to you and assigns as respective interests may appear; your acceptance of policies in lesser amounts or risks shall not be a waiver of Mortgagor's foregoing obligations to pay reasonable attorney's fees for enforcing rights after buyer's default, all risk of loss, damage or destruction shall at all times be on Mortgagor; to pay promptly all taxes, assessments, license fees and other public or private charges when levied or assessed against equipment or this mortgage or any accompanying note; to satisfy all liens against the same. Time is the essence; if any of said debt be not paid promptly when due or if equipment be removed or disposed of or encumbered, or whenever you or assigns shall deem equipment or the debt insecure, all unpaid instalments shall become immediately due and payable and Mortgagor agrees to return equipment to you or assigns on demand, and you or assigns may, to the extent permitted by law, without notice or legal process enter any premises where equipment may be and take possession of it. Mortgagee may foreclose this mortgage in the manner provided by law and to the extent not prohibited by law equipment may be sold with or without notice at private sale or at public sale, with or without having equipment at the sale, at which you or assigns may purchase, and the proceeds thereof, less expenses of retaking, repairing, holding, reselling and reasonable attorney's fees (15% of the unpaid balance, if not prohibited by law), credited upon the amount unpaid and Mortgagor will pay the balance forthwith as a deficiency for the breach of this mortgage, any surplus however, to be paid to Mortgagor.

Waiver of any default shall not be a waiver of any other default all your rights are cumulative and not alternative, if you assign this mortgage you shall not be assignee's agent for any purpose; Mortgagor will settle all claims, defenses, set offs and counterclaims it may have against you, directly [fol. 6] with you, and not set up any thereof against your assignee, you hereby agreeing to remain responsible therefor; no waiver or change in this mortgage or related note, shall bind such assignee unless in writing signed by one of its officers. Upon full payment of this mortgage, assignee may deliver all original papers to you for Mortgagor. No oral agreement, guarantee, promise, representation or warranty shall be binding. Mortgagor waives all exemptions and homestead laws and acknowledges receipt of a true copy hereof. If any part hereof is contrary to, prohibited by or deemed invalid under the applicable laws or regulations of any jurisdiction, such provision shall be inapplicable and deemed omitted but shall not invalidate the remaining provisions hereof.

T. J. WILSON

(Signature of Individual or name
of Corporation or Partnership)

By /s/ T. J. WILSON

Signature
of
Buyer-
Mortgagor

Title OWNER

(If Corporation have signed by
President, Vice-President, or
Treasurer and give official title.
If Owner or Partner, state which)

Witness

Witness

(Signature of Two witnesses,
necessary only in the State of
Texas)

ACCEPTED:

SUPERIOR MANUFACTURING Co.

By _____)

Title Vice President)
(If Corporation, give official
title. If Owner or Partner,
state which.)

Signature
of
Seller-
Mortgagee

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which said instrument of writing was then and there of the value of more than Fifty Dollars (\$50.00), and the prop-[fol. 7] erty of T. J. Wilson, and the said Billie Sol Estes did then and there obtain possession of and acquire the same as aforesaid, with the intent to appropriate the same to his own use, and with the intent of destroying and impairing the right of the said T. J. Wilson, the party justly entitled to the same in this, to-wit, the said Billie Sol Estes did then and there falsely pretend and fraudulently represent to the said T. J. Wilson that the said T. J. Wilson by signing and executing said instrument of writing was purchasing the property specified and listed in said instrument of writing, to-wit:

75—500 Gallon Superior NH3 Tanks Mounted on and together with

75— Wheel Superior Tanks, Complete with Tires, Axles, Wheels and Hose Assemblies.

Serial No's, SF-17214-500 Thru SF-17288-500

65—Superior NH3 Applicators Complete With Regulators, Shanks, Knives, Hoses, and 65—200 Gallon NH3 Tanks.

Tank Serial No's. S304 Thru S368,

and that the said property, as listed and specified in said instrument of writing, secured said instrument of writing

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and was the security thereon, and did thereby fraudulently induce the said T. J. Wilson, who relied upon said false pretenses and fraudulent representations and believed them to be true, to sign and place his, the said T. J. Wilson's, signature on said instrument of writing and to deliver the possession of the said instrument of writing to him, the said Billie Sol Estes, when in truth and in fact the said T. J. Wilson was not purchasing the property listed and specified in said instrument of writing, and said property did not secure said instrument of writing and was not security thereon, and the said Billie Sol Estes then and there knew the said pretenses and representations were false; against [fol. 8] the peace and dignity of the State;

[fol. 151]

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SMITH COUNTY, TEXAS

No. 16,818

[Title omitted]

COURT'S CHARGE AS SUBMITTED TO THE JURY

Members of the Jury:

In this case, the Defendant, Billie Sol Estes, stands charged by indictment duly presented in the 143rd Judicial District Court of Reeves County, Texas, and in the first count thereof, with the offense of swindling alleged to have been committed in the County of Reeves, State of Texas, on or about the 2nd day of March, 1961.

And in the second count thereof, with the offense of theft by false pretext alleged to have been committed in the County of Reeves, State of Texas, on or about the 2nd day of March, 1961.

And in the third count thereof, with the offense of theft by bailee, alleged to have been committed in the County of

Reeves, State of Texas, on or about the 2nd day of March, 1961.

This case has been duly transferred from the 143rd Judicial District Court of Reeves County, Texas, to this Court for trial.

To said indictment, and all three counts therein, the Defendant, Billie Sol Estes, has pleaded "NOT GUILTY".

All three counts of the indictment are being submitted to you in this Charge but in this connection you are instructed that you can find the Defendant guilty only on one count, in the event you find the Defendant guilty.

In arriving at your verdict on any one count in the indictment you are not to consider the guilt or innocence of the Defendant as to the other counts alleged in the indictment.

[fol. 537]

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SMITH COUNTY, TEXAS

No. 16,818

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS No. 5—Filed
April 23, 1963

Be it remembered that upon the trial of this case, after the change of venue from Reeves County, Texas, to Smith County, Texas, the case was called and first came on to be tried in the 7th Judicial District Court of Smith County, Texas, before Hon. Otis T. Dunagan, Judge of Said Court, at 10 o'clock a. m., September 24, 1962.

Prior to the call of this case on said date, the defendants Counsel had received notice through the press that the Court upon the trial of the case would permit live television and radio coverage of the trial.

Thereupon the defendant through his Counsel, prior to the calling of the case, notified the Court that he desired to take up through his Counsel certain matters before he made appearance at the Courthouse and in the courtroom.

Whereupon when the Court convened certain proceedings occurred, prior to the personal appearance of the defendant at the Courthouse or in open court.

Said proceedings are set forth in the Statement of Facts of the Proceedings September 24-25, 1962, filed and approved in and by this Court on April 8, 1963, both as a Statement of Facts and as a Bill of Exceptions (page 2 to page 65, line 17). Said Statement of Facts and Bill of Exceptions is hereby referred to and made a part hereof as if copied in full herein.

Upon the calling of the case defendant through his Counsel objected to television, radio transmission, and live television transmission of the trial and its progress upon the grounds as fully set out in said Statement of Facts and Bill [fol. 538] of Exceptions of Proceedings of September 24-25, 1962, for the reasons as fully set out therein, and offered the testimony and Exhibits in connection with said objections and motions; all of which testimony and Exhibits are filed and approved as part of this Bill.

The Court overruled defendant's objections to the television, radio and cameras, as appears in said Statement of Facts and Bill of Exceptions of Proceedings of September 24-25th, 1962; and the defendant then and there in open Court excepted.

In connection with this Bill all pictures and exhibits offered in connection herewith are made part of this Bill and sent up as original exhibits.

Thereafter upon September 25th, 1962, the Court continued this case until October 22nd, 1962 for trial.

Thereafter upon October 2, 1963, the following press release was made by the Associated Press and printed in papers of general circulation in Tyler, Texas, in Smith County, Texas:

TYLER, TEX., OCT. 1 (AP)—DIST. JUDGE OTIS T. DUNAGAN RULED OUT LIVE TELECASTS AND LIVE BROADCASTING TODAY FOR MUCH OF THE

SCHEDULED OCT. 22 BILLIE SOL ESTES CASE ON THE GROUNDS THAT IT VIOLATES LAWS REGARDING WITNESSES.

BUT HE SAID CÁMERAS WOULD CONTINUE TO BE ALLOWED IN THE COURTROOM PROVIDED THE STATE BAR OF TEXAS DOES NOT HOLD AGAINST THEM.

THE JURIST SAID, "TELEVISION AND RADIO SHOULD BE GIVEN EQUAL TREATMENT WITH OTHER NEWS MEDIA INsofar AS THE LAW COVERING TRIAL PROCEDURE PERMITS. I BELIEVE IT WOULD BE THE RANKEST KIND OF DISCRIMINATION BETWEEN THE NEWS MEDIA TO REFUSE THESE TWO SOURCES OF REPORTING THE NEWS EQUAL ACCESS TO NEWS COMING FROM THE TRIAL OF LAWSUITS INsofar AS IT CAN BE DONE IN KEEPING WITH PROPER COURT PROCEDURE".

JUDGE DUNAGAN SAID, HOWEVER, THAT HE WAS NOTIFYING BOTH TELEVISION AND RADIO THAT LIVE 'CASTING WOULD NOT BE PERMITTED DURING THE QUESTIONING OF JURORS IN TESTING THEIR QUALIFICATIONS OR OF THE [fol. 539] WITNESSES' TESTIMONY.

TO GIVE SUCH PERMISSION, THE JUDGE SAID, WOULD VIOLATE THE TEXAS WITNESS RULE WHICH PROHIBITS ONE WITNESS FROM HEARING THE TESTIMONY OF ANOTHER.

JUDGE DUNAGAN SAID HE WAS MAKING THE RULING BECAUSE OF THE WITNESS RULE AND NOT BECAUSE OF ANY CRITICISM OF HIS PERMITTING LIVE COVERAGE OF PRELIMINARY LEGAL MOVES AT THE SEPT. 24-25 SESSION.

HE SAID THE TELEVISION AND BROADCAST COVERAGE WOULD BE ON A POOL BASIS AND DESIGNATED MARSHALL PENGRA, MANAGER OF KLTV-TV, TYLER, IN CHARGE OF THE POOL.

THE TEXT OF THE JUDGE'S STATEMENT:

"IN MY STATEMENT OF SEPT. 24, 1962, ADMITTING TELEVISION AND OTHER CAMERAS IN THE

COURTROOM DURING THE TRIAL OF BILLIE SOL ESTES, I SAID CAMERAS WOULD BE ALLOWED UNDER THE CONTROL AND DIRECTION OF THE COURT SO LONG AS THEY DID NOT VIOLATE THE LEGAL RIGHTS OF THE DEFENDANT OR THE STATE OF TEXAS.

"TELEVISION AND RADIO, BEING MEANS OF PRESENTING THE NEWS, SHOULD BE GIVEN EQUAL TREATMENT WITH OTHER NEWS MEDIA INsofar AS THE LAW COVERING TRIAL PROCEDURE PERMITS.

"I BELIEVE IT WOULD BE THE RANKEST KIND OF DISCRIMINATION BETWEEN THE NEWS MEDIA TO REFUSE THESE TWO SOURCES OF REPORTING THE NEWS EQUAL ACCESS TO NEWS COMING FROM THE TRIAL OF LAWSUITS IN THE COURTROOM INsofar AS IT CAN BE DONE IN KEEPING WITH PROPER COURT PROCEDURE.

"IN LINE WITH MY STATEMENT OF SEPT. 24, 1962, I AM AT THIS TIME INFORMING BOTH TELEVISION AND RADIO THAT LIVE BROADCASTING OR TELECASTING BY EITHER NEWS MEDIA CANNOT AND WILL NOT BE PERMITTED DURING THE INTERROGATION OF JURORS IN TESTING THEIR QUALIFICATIONS OR OF THE TESTIMONY GIVEN BY THE WITNESSES AS TO DO SO WOULD BE IN VIOLATION OF ARTICLE 644 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, WHICH PROVIDES AS FOLLOWS: 'AT THE REQUEST OF EITHER PARTY, THE WITNESSES ON BOTH SIDES MAY BE SWORN AND PLACED IN THE CUSTODY OF AN OFFICER AND REMOVED OUT OF THE [fol. 540] COURTROOM TO SOME PLACE WHERE THEY CANNOT HEAR THE TESTIMONY AS DELIVERED BY ANY OTHER WITNESS IN THE CASE. THIS IS TERMED PLACING WITNESSES UNDER RULE.'

"IF THE JUDICIAL SECTION OF THE STATE BAR OF TEXAS, MEETING IN AUSTIN ON OCT. 5 AND 6, DOES NOT ADOPT RULE 35 OF THE CANON

OF ETHICS OF THE AMERICAN BAR ASSOCIATION AND CONTINUES TO PERMIT EACH JUDGE TO CONDUCT HIS COURT AND CONTROL HIS COURTROOM AS HE DEEMS RIGHT AND PROPER, AS LONG AS THE LAW IS COMPLIED WITH, IN THAT EVENT, EACH TELEVISION NETWORK AND LOCAL TELEVISION STATION WILL BE ALLOWED ONE FILM CAMERA WITHOUT SOUND IN THE COURTROOM AND THE FILM WILL BE MADE AVAILABLE TO OTHER TELEVISION STATIONS ON A POOLED BASIS.

MARSHALL PENGRA, MANAGER OF TELEVISION STATION KLTU, TYLER, WILL BE IN CHARGE OF THE INDEPENDENT POOL AND INDIVIDUAL STATIONS MAY CONTACT HIM. THE SAME WILL BE TRUE OF CAMERAS FOR THE PRESS, WHICH WILL BE LIMITED TO THE LOCAL PRESS, ASSOCIATED PRESS AND UNITED PRESS.

"THE ESTES CASE WAS CALLED FOR TRIAL IN TYLER ON SEPT. 24, AND WAS NOT THE FIRST CASE IN TEXAS WHERE TELEVISION AND OTHER CAMERAS WERE PERMITTED. THERE HAVE BEEN SEVERAL CASES IN MY COURT IN WHICH TELEVISION AND OTHER CAMERAS HAVE BEEN PERMITTED IN THE COURTROOM. ALMOST EVERY NIGHT ON TELEVISION NEWS PROGRAMS, I SEE PICTURES OF COURTROOM PROCEEDINGS THAT WERE FILMED IN THE COURTROOMS. THIS PRACTICE HAS BEEN GOING ON FOR SEVERAL YEARS IN MY COURT AND OTHER COURTS THROUGHOUT THIS STATE.

"THE ESTES CASE IS NOT THE FIRST IN WHICH LIVE TELEVISION FROM THE COURTROOM HAS BEEN PERMITTED. TO MY KNOWLEDGE, THERE HAVE BEEN TWO OTHERS, THE FIRST ONE SEVERAL YEARS AGO FROM WACO, A MURDER TRIAL, I BELIEVE. HOWEVER, TRIALS HERETOFORE TELECAST LIVE FROM TEXAS COURTROOMS WERE PERMITTED BY CONSENT OF BOTH PROSECUTION AND DEFENSE LEGAL COUNSEL, AND,

THEREFORE, ANY OBJECTION TO A VIOLATION OF ARTICLE 644 IN THIS RESPECT WAS WAIVED. SINCE THAT TIME, NEITHER THE STATE BAR OF TEXAS NOR THE JUDICIAL SECTION OF THE STATE BAR HAVE CONDEMNED SUCH PRACTICE. [fol. 541] I AM MAKING THIS STATEMENT AT THIS TIME IN ORDER THAT THE TWO NEWS MEDIA AFFECTED MAY HAVE SUFFICIENT NOTICE BEFORE THE CASE IS CALLED ON OCT. 22.

"THE RULES I HAVE SET FORTH ABOVE CONCERNING THE USE OF CAMERAS ARE SUBJECT TO CHANGE IF I FIND THAT THEY ARE TOO RESTRICTIVE OR NOT WORKABLE, FOR ANY REASON.

"AT THE BEGINNING OF THE ESTES TRIAL IN THIS COURT, I STATED THAT I HAD NOT INVITED EITHER TELEVISION, RADIO OR THE PRESS TO BE HERE, BUT THAT THEY WERE HERE. HOWEVER, ONE NEWS WIRE SERVICE, IN ITS REPORT, CARRIED IN NEWSPAPERS ALL OVER THE NATION, QUOTED ME AS HAVING SAID THAT I HAD INVITED TELEVISION, RADIO AND PRESS TO BE HERE. I AM TAKING THIS OPPORTUNITY TO CORRECT THAT ERROR AND REQUESTING THAT WIRE SERVICE TO MAKE THE NECESSARY EXPLANATION FOR THEIR MISTAKE."

The Judicial Cannon of the American Bar Association reads as follows:

"Judicial Canon 35, Improper Publicizing of Court Proceedings:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings (are calculated to) detract from the essential dignity of the proceedings, distracts (the) participants and witnesses in giving (his) testimony, (degrade the court) and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the Court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

[fol. 542] The above is the text of the Canon at the time of the trial, except the Special Committee on Proposed Revision of Judicial Canon 35 has made recommendations since this trial that the part in brackets above be deleted and the part underlined be added.

The American Bar Association Committee recommended that "The Canons of Professional Ethics and the Canons of Judicial Ethics as adopted by the American Bar Association, constitute the standards of policy recommended by the American Bar Association for consideration and voluntary guidance of the rule-making authorities of the states of the United States, and have the force of law only where voluntarily adopted and incorporated in state laws or as a rule of court. The Committee recommends that the rule-making authority of each state exercise the exclusive responsibility of adopting Canons of Ethics in the interest of statewide uniformity, ~~and avoidance of confusion and~~ pressure that have resulted in some jurisdictions where magistrates or judges have individually adopted rules concerning the conduct of their courts".

The State of Texas has not adopted a Code of Canons of Judicial Ethics, neither by Statute, rule, or action of Texas Judicial Conference. On October 4th to 6th, 1962, prior to the trial of this case on October 22nd, 1962, but after the proceedings on September 24-25th, 1962, the Texas Judicial Conference, an organization of trial and appellate judges in Texas, met in Austin, Texas. The Committee theretofore appointed and serving to consider the adoption of Canons of Judicial Ethics in Texas recommended the adoption of all the American Bar Association Canons of Judicial Ethics except Canon 35. The Conference refused to adopt said recommendation, but decided that the Con-

ference would continue to consider the feasibility of the adoption of a Code of Judicial Ethics in Texas, and to consider the matter further at the annual meeting in 1963. [fol. 543] The defendant objected to the televising and broadcasting of the trial for the reasons shown in the Statement of Facts and Bill of Excepts—September 24-25, 1962, approved and filed April 8, 1963, among the same being the following:

1. The live televising constituted an invasion of privacy of the defendant and his counsel, and deprived them of freely discussing in the courtroom their advice and matter of defense in regard to the case without having a picture taken while it was being done.
2. It was unfair in preventing the defendant from feeling at ease.
3. It placed undue emphasis upon some supposed special importance of this particular trial as opposed to ordinary justice in trials, and it was calculated to cause the jury to think there was something more important about this case and something more expected of them than in the ordinary case; this being timed particularly with reference to the publicity which had already gone with the cases.
4. It has a tendency to distract the attention of the jury while the pictures were being taken; and the jury would have a tendency at tense moments to be looking at the camera rather than at the witnesses and paying attention to what is being said.
5. It distracts the witness and causes them to be watching the camera.
6. It made it impossible for the defendant's counsel to give his attention to the case and to properly represent their client because of the distraction.
7. The presence of the cameras denied due process and a fair trial; there being eight cameras trained upon counsel at the time of the objection, including two large television cameras; and the floor being covered with wire within the rail; outside the Courthouse a large motor unit,

attracting the attention of the venire as they entered the courthouse.

[fol. 544] 8. The presence of the equipment was likely to and probably did emphasize to potential jurors that the press of public opinion on the case should be given weight in their verdict.

After the case had been continued the case was called again upon October 22nd, 1962, and the defendant again objected to live radio and television reporting of the trial. The proceedings occurred, appearing at pages 3 to p. 120, line 10, of the Statement of Facts on Preliminary Motions and Voir Dire of Thirty-Two Member Jury List, filed and approved as a Statement of Facts and Bill of Exceptions on April 8, 1963.

Defendant at said time renewed his objection to live television and radio broadcast of any of the proceedings as stated in said Bill of Exceptions immediately aforesaid, but the Court overruled such objections stating his ruling at length at page 3 and 4 of the Statement of Facts and Bill of Exceptions referred to in the last paragraph and overruled defendant's objections; to which the defendant then and there in open court excepted.

In connection with said objection defendant offered in evidence among other Exhibits the tape recording and two hour broadcast of the proceedings of September 24th, 1962, which was broadcast in Tyler, Texas, the night of September 24th, 1962, which original tape is sent up as an original Exhibit with the other Exhibits under order of the Court.

Thereupon the proceedings continued under live broadcast and television during the entire trial in accordance with the order of the Court.

The defendant offered in support of his objection additional testimony as hereinbefore referred to as contained in the Statement of Facts and Bill of Exceptions approved on April 8, 1963; and the exhibits in connection therewith, and all photographs taken with permission of the Court of the Courtroom, Courthouse and immediate vicinity; and the State offered certain Exhibits and photographs; all of

which Exhibits are filed and approved as part of this Bill and sent up as original exhibits.

[fol. 545] Prior to the argument the defendant made the following additional objection:

"Mr. Cofer: Now, Your Honor, we want again to object to television and photographs in the courtroom while the jury (trial) is still in progress. We object to any pictures taken while the arguments are going on, or while the jury is in the box, and we object to any television, live or simply pictures, and in the event the Court adheres to his announcement that has been made, we want to except to it; and then we want to make a special request that the argument for the two lawyers for the Defense not be photographed or not be televised, live or not be photographed, and that no pictures be permitted to be taken while Mr. Hume Cofer and myself are making ours."

The court then ruled as follows:

"I overrule your first request, but now, the last request is going to be granted, and now, I order that while Mr. Hume Cofer and while Mr. John Cofer are addressing the jury that the cameras not be on them, and all sound be turned off, and there will be no press photographers, pictures made of either of those gentlemen while they are addressing the jury; otherwise, you may proceed, but for those two, follow that order of the Court."

The defendant excepted to the part of the Court's order which overruled his motion.

The arguments proceeded, and during the arguments, opening and closing, for the State the arguments were broadcast live over radio and television with pictures and sound, the cameras being directly trained on the State's attorneys and the jury.

During the arguments of Mr. Hume Cofer and Mr. John Cofer, the cameras were not directed at them but at the Judge of the Court, and the arguments were monitored by audio equipment, and relayed by the voice of a news announcer live while the arguments were being made.

[fol. 546] The jury returned a verdict upon the first Count of the Indictment after sending in the inquiry as contained and set out in Defendant's Bill of Exceptions No. 4.

Wherefore Defendant tenders this his Bill of Exceptions No. 5 and prays that it be filed, and his exceptions noted and that the Clerk immediately call the trial judge's attention to the filing of this bill, and that it be allowed, as part of the record in this case.

J. Byron Saunders of Tyler, Texas; John P. Dennison of Pecos, Texas; Cofer, Cofer & Hearne of Austin, Texas, By John D. Cofer, Attorneys for Defendant, Billie Sol Estes.

The foregoing Bill of Exceptions No. 5 having been reduced to writing by counsel for defendant, and having been filed within the ninety-days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and I, having considered the same, and the same having been found by me to be correct, I hereby act thereon, and the same is hereby allowed, and approved as part of the record in this case, and it is ordered that such approval be noted as of the _____ day of _____, A. D. 1963.

_____, Trial Judge Presiding.

FILED: April 23, 1963

The foregoing Bill of Exceptions No. 5 having been reduced to writing by counsel for Defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and the Court having considered and examined the same, said Bill is refused this the 3 day of May, 1963 for the following reasons:

[fol. 547] This case was first set for trial in the 7th Judicial District Court of Smith County, Texas, for September 24, 1962 at 10:00 A. M.

Prior to the calling of the case for trial, the Defendant, through his attorneys, at 10:00 A. M. on said date pre-

sented his Motion that the telecasting, broadcasting by radio and photographing of the trial not be permitted. After hearing testimony concerning same and arguments of counsel, the Motion was overruled by the Court. The case was then called for trial, State of Texas announced ready and the Defendant filed his Motion for continuance upon three grounds; as is reflected by the transcript on appeal in this case, to which reference is made. After hearing arguments of counsel, the Court overruled Defendant's Motion on the first two grounds and sustained his Motion based upon the last ground, which was due to the absence of certain Defendant's witnesses, and the case was reset for trial for October 22, 1962 at 10:00 A. M.

The hearing which began on September 24th continued through September 25th, and live telecasting, radio broadcasting and press photography were permitted. However, the only matters considered were the Motion not to allow telecasting, broadcasting and press photography and Defendant's Motion for Continuance.

There were a few wires laid neatly along the floor next to the wall in the courtroom and there were a few wires across the floor but the floor was not covered with wires.

There was not any evidence or testimony offered on the merits of the case. The only testimony offered was in support of Defendant's Motion to prevent telecasting, broadcasting by radio or press photography.

Prior to the trial of October 22, 1962, there was a booth constructed and placed in the rear of the courtroom painted the same or near the same color as the courtroom with a [fol. 548] small opening across the top for the use of cameras, a picture of said booth being a part of this record and sent up as one of the original exhibits; and the Appellate Court is referred to said exhibit for its physical appearance.

Live telecasting and radio broadcasting were not permitted and the only telecasting was on film without sound, and there was not any broadcasting of the trial by radio permitted. Each network, ABC, NBC, CBS and KRLD Television in Tyler was allowed a camera in the courtroom, ABC having been represented by WFAA, Dallas, Texas,

CBS and KRLD, Dallas, and NBC by WBAP of Fort Worth. The telecasting on film of this case was not a continuous camera operation and only pictures being taken at intervals during the day to be used on their regular news casts later in the day. There were some days during the trial that the cameras of only one or two stations were in operation, the others not being in attendance upon the Court each and every day. The Court did not permit any cameras other than those that were noiseless nor were flood lights and flash bulbs allowed to be used in the courtroom. The Court permitted one news photographer with Associated Press, United Press International and Tyler Morning Telegraph and Courier Times. However, they were not permitted inside the Bar; and the Court did not permit any telecasting or photographing in the hallways leading into the courtroom or on the second floor of the courthouse where the courtroom is situated, in order that the Defendant and his attorneys would not be hindered, molested or harassed in approaching or leaving the courtroom. The Court did permit live telecasting of the arguments of State's counsel and the returning of the verdict by the Jury and its acceptance by the Court. The opening argument of the District Attorney of Smith County was carried by sound and because of transmission difficulty, there was not any picture. The closing argument for the State by the District Attorney of Reeves County was carried live by both picture and sound. The arguments of attorneys for Defendant, John D. Cofer and Hume [fol. 549] Cofer, were not telecast or broadcast as the Court granted their Motion that same not be permitted.

There was not any televising at any time during the trial except from the booth in the rear of the courtroom, and during the argument of counsel to the jury, news photography was required to operate from the booth so that they would not interfere or detract from the attention of either the jurors or the attorneys.

During the trial that began October 22nd, there was never at any time any radio broadcasting equipment in

the courtroom. There was some equipment in a room off of the courtroom where there were periodic news reports given; and throughout the trial that began October 22nd, not any witness requested not to be televised or photographed while they were testifying. Neither did any juror, while being interrogated on voir dire or at any other time, make any request of the Court not to be televised.

Otis T. Dunagan, Trial Judge Presiding.

The foregoing bill of Exception was returned to me by the Trial Judge on May 3, 1963, at 3:29 o'clock P. M.

Thomas E. Wall, Clerk, 7th Judicial District Court of Smith County, Texas.

FILED: May 3, 1963.

[fol. 550] On this 15th day of May, 1963, the Defendant hereby agrees to the reasons assigned by the Judge for refusing to approve Defendant's Bill of Exceptions No. 5, and accepts the Court's qualification thereof, and asks that his agreement thereto and acceptance thereof be noted.

J. Byron Saunders; John P. Dennison; Cofer, Cofer & Hearne, By /s/ John D. Cofer, Attorneys for Defendant.

The above agreement and acceptance of and by the Defendant, on this 15th day of May, 1963, within the time provided by Article 760 d, C.C.P., is hereby noted and Ordered filed and attached to said Defendant's Bill of Exceptions No. 5, and the Court's ground of refusal and qualification thereof.

Otis T. Dunagan, Judge Presiding.

Filed this 15th day of May, 1963.

Thomas E. Wall, Clerk, 7th Judicial District Court of Smith County, Texas, By Patsy Alfred, Deputy.

Recorded Vol. 8, p. 492, Minutes of the 7th District Court of Smith County, Texas.

[fol. 551]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

DEFENDANT'S BILL OF EXCEPTIONS No. 6—Filed
April 23, 1963

Be it remembered that upon the trial of this case that before the trial commenced, and before announcement, and before the commencement of the selection of the jury, defendant and his Counsel objected to proceeding to trial in accordance with the Court's ruling permitting radio and television broadcasting during the trial in the case, because participation of Counsel in such hearing violated the said Counsel's personal views of the professional duties and ethical conduct.

Live radio broadcasting by radio and television was to be and was permitted by the Court's order as appears in Defendant's Bill of Exceptions No. 5, and in the Statement of Facts also approved as a Bill of Exceptions of the Proceedings September 24-24, 1962, filed and approved April 8th, 1963, and the Statement of Facts also approved as a Bill of Exceptions on Preliminary Motions and Voir Dire, filed and approved April 8th, 1963, and in the Statement of Facts in the case, also approved as a Bill of Exceptions, filed April 8th, 1963.

Senior Counsel for defendant, Mr. John D. Cofer, before the beginning of the interrogation of the venire made the following statements and objections in substance.

He is a practising licensed attorney for forty-one years, and is licensed to practice in Texas, in the Supreme Court of The United States, in the Fifth Circuit, and in all of the Federal District Courts Divisions in Texas.

He is a member of the American Bar Association and has been for in excess of thirty years. All the members of his firm are members of the American Bar Association.

It was highly distasteful to him to be forced to defend a [fol. 552] man in a criminal case where cameras are trained

on him during the trial or any part of the trial. He believes sincerely in Canon 35 of the American Bar Association which prohibits photography or cameras in the courtroom.

He, since the proceedings of September 24-25, 1962 had given very serious consideration to asking the Court to relieve him from the necessity and duty of defending the Defendant in this courtroom in this case. He had consulted, with reference to that, with his client, his associates and other attorneys, since he considered it a personal matter. He reached the conclusion that to make such a request not only might possibly result in delaying the trial of this case but that it would have the effect of featuring this trial upon himself personally and might be construed as an effort to obtain some personal vindication and publicity in the trial.

So he had come to the conclusion that he was not justified in going to that extreme and so embarrassing this Court by refusing as an attorney to participate in something that violates his code of ethics very much.

To him, it is so highly improper for a lawyer, The Court, or any judicial proceedings to proceed under this character of publicity.

Such a trial is not, in his opinion, part of the protection of the First Amendment to the Constitution, but such amendment is for the protection of the defendant, and only two people, the State of Texas and the Defendant, have interests in the trial.

The situation in which said attorney was placed, according to his statement, seriously interferes with him in rendering his best services to his client. The fact that it outrages his personal ethics, colors his feelings and makes it difficult for him to the extent he feels he should be unable to pass wisely upon the rights of the Defendant in this case. [fol. 553] He does not think that he should be required to undergo a trial with publicity of this kind.

While the situation was substantially cleaned up from the proceedings of September 24-25th, 1962, still as defense counsel sits on the witness stand, the courtroom did not to him look like a courtroom, but like a moving picture theater.

Five cameras were seen by him shining out of the booth just as cameras do at a moving picture show at a theater.

The Court overruled the attorneys personal objection and adhered to his previous ruling as appears in Defendants Bill of Exceptions No. 6, and other Bills referred herein; to which action of the Court, defendant then and there in open Court excepted.

And defendant's exception to the action of the Court aforesaid having been overruled and noted, defendant tenders this his Bill of Exceptions No. 6, and prays that it be filed, and his exception noted, and that the Clerk immediately call the trial judge's attention to the filing of this bill, and that it be allowed, as part of the record in this case.

J. Byron Saunders of Tyler, Texas, John P. Dennison of Pecos, Texas, Cofer, Cofer & Hearne of Austin, Texas, By John D. Cofer, Attorneys for Defendant.

The foregoing Bill of Exceptions No. 6 having been reduced to writing by counsel for defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and I, having considered the same, and thereon, and the same is hereby allowed, and approved as part of the record in this case, and it is ordered that such approval be noted as [fol. 554] of the day of, A. D., 1963.

....., Trial Judge Presiding.

Filed: April 23, 1963.

The foregoing Bill of Exceptions No. 6 having been reduced to writing by counsel for Defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and the Court having considered and examined the same, said Bill is refused this the 3 day of May, 1963 because:

Live radio broadcasting or television was not permitted by the Court during the voir dire of the jury or during the taking of testimony. Even though the Court had ruled that live radio broadcasting and television would be permitted during the preliminary matters, neither was done. The only live radio broadcasting or televising of this trial which began October 22, 1962, was of the arguments to the jury of the District Attorneys of Smith County and Reeves County; and due to transmission difficulty, the opening argument by the District Attorney of Smith County was not carried by picture but only by sound.

As to whether the physical set-up for telecasting in the courtroom resembled Hollywood, the Trial Court refers the Appellate Court to Defendant's Exhibit 30, being a photograph of the booth on the opening date of the trial, October 22, 1962, and State's Exhibit 8, being a photograph of the same booth depicting the physical appearance of the booth upon the convening of court at 9:00 A. M. on October 23, 1962, which condition remained the same throughout the trial. The first day of the trial was consumed with motions and other preliminary matters and the jury panel did not report for duty until 9:00 A. M. [fol. 555] October 23, 1962, and the voir dire of the jury panel began upon the last date mentioned.

Otis T. Dunagan, Trial Judge Presiding.

The foregoing bill of Exception was returned to me by the Trial Judge on May 3, 1963, at 3:20 o'clock P. M.

Thomas E. Wall, Clerk, 7th Judicial District Court
of Smith County, Texas.

Filed: May 3, 1963.

On this 15th day of May, 1963, the Defendant hereby agrees to the reasons assigned by the Judge for refusing to approve Defendant's Bill of Exceptions No. 6, and accepts the Court's qualification thereof, and asks that his agreement thereto and acceptance thereof be noted.

J. Byron Saunders, John P. Dennison, Cofer, Cofer and Hearne, By John D. Cofer, Attorneys for Defendant.

The above agreement and acceptance of and by the Defendant, on this 15th day of May, 1963, within the time provided by Article 760 d, C. C. P., is hereby noted and Ordered filed and attached to said Defendant's Bill of Exceptions No. 6, and the Court's ground of refusal and qualification thereof.

Otis T. Dunagan, Judge Presiding.

Filed this 15th day of May, 1963.

Thomas E. Wall, Clerk, 7th Judicial District Court of Smith County, Texas, By Patsy Alfred, Deputy.

Recorded Vol. 8, p. 493, Minutes of the 7th District Court of Smith County, Texas.

[fol. 872]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

DEFENDANT'S BILL OF EXCEPTIONS No. 24—
Filed April 23, 1963

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[fol. 878] Three counts went to the jury for deliberation, one on theft, one on swindling and one on embezzlement. Defendant had no way of knowing on which count the State relied for conviction nor did the jury, and defendant contended he was unable to present his case and make his arguments fully informed as to what count was being relied upon and under what theory the State sought conviction.

At the close of the arguments, the jury retired to the jury room in charge of a bailiff. In a very few minutes, before the Court had time to send the written charge to the jury and before the parties had time to complete the assembling of the Exhibits to send to the jury for its deliberations, the jury sent in a note to the Court inquiring whether the jury could convict defendant on all three counts.

The Court wrote instructions that the jury should read the Court's charge and follow the charge.

Defendant's exception to the action of the Court having been overruled, defendant tenders this his Bill of Exceptions No. 24 and prays that it be filed, and his exception noted, and that the clerk immediately call the trial judge's attention to the filing of this bill, and that it be allowed, as a part of the record in this case.

J. Byron Saunders of Tyler, Texas, John P. Dennison of Pecos, Texas, Cofer, Cofer & Hearne of Austin, Texas, By John D. Cofer, Attorneys for Defendant.

The foregoing Bill of Exceptions No. 24 having been reduced to writing by counsel for defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and I, having

considered the same, and the same having been found by me to be correct, I hereby act thereon, and the same is hereby allowed, and approved as part of the record in [fol. 879] this case, and it is ordered that such approval be noted as of the day of, A. D. 1963.

....., Trial Judge Presiding.

Filed: April 23, 1963.

The foregoing Bill of Exceptions No. 24 having been reduced to writing by counsel for Defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and the Court having considered and examined the same, said Bill is refused this the 3 day of May, 1963 because:

This case was first called for trial in the 7th Judicial District Court of Smith County, Texas, on September 24, 1962 at 10:00 A. M. but did not proceed to trial. The case was continued on Motion of Defendant and by the Court reset for trial October 22, 1962 at 10:00 A. M. The Defendant was not called upon to plead in this court nor the indictment presented and no evidence on the merits of the case was offered until during the trial which began October 22, 1962.

The jury did send a note to the Court soon after retiring to the jury room to deliberate their verdict, as reflected by this Bill of Exceptions. However, the jury carried the Court's written Charge with them to the jury room upon retiring and had said written Charge with them at the time the note was sent to the Court. In so far as the exhibits were concerned, those called for by the jury were immediately sent to them.

Otis T. Dunagan, Trial Judge Presiding.

The foregoing Bill of Exception was returned to me by the Trial Judge on May 3, 1963, at 3:20 o'clock P. M.

Thomas E. Wall, Clerk, 7th Judicial District Court
of Smith County, Texas.

Filed: May 3, 1963.

[fol. 880] On this 15th day of May, 1963, the Defendant hereby agrees to the reasons assigned by the Judge for refusing to approve Defendant's Bill of Exceptions No. 24 and accepts the Court's qualification thereof, and asks that his agreement thereto and acceptance thereof be noted.

J. Byron Saunders, John P. Dennison, Cofer, Cofer & Hearne, By John D. Cofer, Attorneys for Defendant.

The above agreement and acceptance of and by the Defendant, on this 15th day of May, 1963, within the time provided by Article 760 d, C.C.P., is hereby noted and Ordered filed and attached to said Defendant's Bill of Exceptions No. 24 and the Court's ground of refusal and qualification thereof.

Otis T. Dunagan, Trial Judge Presiding.

Filed this 15th day of May, 1963.

Thomas E. Wall, Clerk, 7th Judicial District Court of Smith County, Texas, By Patsy Alfred, Deputy.

Recorded Volume 8, page 498, Minutes of the 7th District Court of Smith County, Texas.

[fol. 928] [File endorsement omitted]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

[Title omitted]

STATEMENT OF FACTS—September 24-25, 1962

[fol. 929]

APPEARANCES:

Hon. Otis T. Dunagan, Judge Presiding.

Representing the State of Texas,

Hon. R. B. McGowen, Jr., District Attorney, Monahans,
Texas:

Hon. Frank Maloney, Assistant Attorney General, Aus-
tin, Texas:

Hon. Weldon Holcomb, Crim. District Attorney, Tyler,
Texas:

Hon. H. D. Glover, County Attorney, Pecos, Texas.

Representing the Defendant,

Hon. John D. Cofer, Hon. G. Hume Cofer, Austin, Texas:

Hon. John P. Dennison, Pecos, Texas:

Hon. J. Byron Saunders, Tyler, Texas.

[fol. 930] Be It Remembered: That heretofore, to-wit, on
the 24th day of September, 1962, there came on for trial
the foregoing entitled and numbered cause, whereupon all
matters presented to the Court were as follows, to-wit:

By the Court: Gentlemen, I understand that before the
case is called for trial, and before we go into the trial of

the case set this morning, Defendant has a Motion that he desires to present to the Court at this time.

Mr. John D. Cofer: May it please the Court, I will state, generally what the grounds are and she can take it down and then we will reduce it to more formal grounds, but will not add anything to it.

The Court: That will be all right.

**MOTION THAT NO PHOTOGRAPHY OF ANY KIND BE PERMITTED
AND COURT'S INSTRUCTIONS THEREON**

Mr. Cofer: We would especially like to move, Your Honor, this morning that during the trial of this case and the preliminary hearings, such time as the Defendant is in the corridors of this court house and in this court room that no photography of any kind be permitted.

[fol. 931] Mr. McGowen: Your Honor, might I interrupt just a minute. I don't see the Defendant here. I am wondering about the requirement of his presence.

Mr. Cofer: We have explained that to the Court.

The Court: That is the reason I stated that we have not gone into trial. I have not called it for trial.

Mr. Cofer: The Defendant will be here as soon as the Motion is disposed of. It will be rendered; we think, largely useless if he came in here at this time.

We have to move that there be no photography, either television or moving pictures or still photography, and particularly flash light photography, in the court room or in the corridors where the venire gather for the reason:

First: That we can see that the taking of pictures of the attorney and the Defendant in the court room while we are sitting here during the trial, and we have been informed or heard over television, that it is planned to televise this live, that that is an invasion of the privacy of the Defendant and his counsel, and that it deprives them of freely discussing in the court room their advice and matters of defense in regard to the case without having a picture taken while it is being done. We further think that it is unfair to the Defendant because it places him in a condition where he cannot be freely at ease. We also think

that it tends to put undue emphasis upon some supposed special importance of this particular trial as opposed to ordinary justice in trials; and it is calculated to cause the jury to think there is something more important about this and something more expected of them than in the ordinary case. That is particularly true with reference to the publicity which has already gone with this case.

Now, we have here, which—we haven't brought it in the court room yet, but it will be brought in and identified later, twelve volumes that are about eight inches thick, I would say, and ten by twelve in size, which contains what we have been able to secure through services of the publicity that has been given this case in Texas and throughout the nation. We think that, taken with that publicity, that it tends to render it difficult for the Defendant, and impossible for the Defendant to get a fair and impartial trial. [fol. 933] For the additional reason, that it has a tendency to distract the attention of the jury while the pictures are being taken; that they have a tendency in the tensest moments to be looking at the camera rather than at the witness and paying attention to what is being said. That it also distracts witnesses and causes them to watch the cameras.

Also, speaking as an attorney—and I don't necessarily intend this for the record—but I know that I am getting cranky, Your Honor, in my old age because I continually dream that I am cranky, and I have always heard that when you dream a thing, that it expresses your true nature. So, perhaps, I am getting cranky, but motion pictures and the grinding of cameras while I am interrogating or cross-examining witnesses makes it almost impossible for me to give my attention to the case and to properly represent my client.

Now, we urge this Motion as a matter of due process and we think the evidence will show in this case that maybe there are two televisions, either stations or channels, or something here; there are one, two, three, four, five, six, seven, eight cameras trained on me now. I see the floor [fol. 934] covered with wires; there is an outside, to attract the attention of the venire as they come in, a motor

unit like they have at football games; and we conceive that the cooperation of the County officials in permitting this type of publicity amounts to an action of the State, through its properly constituted officials, of denying to this Defendant his rights and civil rights of due process to equal protection of the law guaranteed to him by the Constitution and the Amendments—Constitution of the United States and particularly the Fourteenth, and in particular, denies him the rights that are guaranteed to him by the Civil Rights Statute which prohibits the Defendant from being deprived of any rights to the action of State authorities; and our understanding here, that, with Your Honor's consent, there is a radio outside. I don't know to what extent that would interfere with the progress of the trial. Certainly, if those people don't come in here and speak over the microphone, the venire will not see that. I spoke to Your Honor about the newspaper men being within the Bar, seated in the court room. I think the newspaper men will conduct themselves properly, and certainly would not [fol. 935] want them moving about to such an extent or any sort of discourse over there. The ones I know I am sure would demean themselves properly and while that, to some extent, might detract the jury, they might get used to it, but I can't believe they will get used to all of these cameras. I never have. It has been going on for twenty years and I have always insisted on it and in only one case was I did I object to it, in which case it was not reversed on that ground.

Thank you, Your Honor. Now, we will reduce that to proper form later on.

The Court: Let me make this statement. You referred to cameras on the outside of the court house with the permission of the Court. I want to say I did not grant that permission. I do not have any jurisdiction out there.

Mr. Cofer: I think you must have misunderstood me there. So far as we are concerned, we can't keep them from taking pictures out there. The Defendant is not going to attack any camera man. He is going to take it very calmly, but it is the continually photographing of the Defendant in the presence of the jury and the venire that has a ten-

[fol. 936] dency to make the jury feel that this is something special; and it is just an ordinary case. It is a case where a man is accused of having either swindled or stolen from another individual and it could only justify and rate this publicity because of some special significance which has been given it by sources and matters which are so improper to be brought into the court room, that in our opinion, Your Honor should not countenance; and for that reason, we have stated, Your Honor, in a letter heretofore our position. We have stated to Your Honor this morning that Mr. Estes is now awaiting whatever decision is made of this and he will be here immediately.

Thank you, Your Honor.

Mr. McGowen: Your Honor, we feel that Mr. Cofer over-stated the degree to which this type of coverage will interfere. However, we would like to say that we, of course, would not be interested in anything that would interfere with the trial of this case. It is a matter within Your Honor's sole discretion, and I assume it has been given some thought how it could be handled without interference. [fol. 937] The Court: Anything further on the Motion from any one?

Mr. Hume Cofer: That is all.

The Court: I want to say to Mr. Cofer that I appreciate your advising me some week or more ago that you would file this Motion which gave me time to do much thinking about the matter.

In the past, it has been the policy of this Court to permit televising in the court room under the rules and supervision of the Court. Heretofore, I have not encountered any difficulty with it. I was unable to observe any detraction from the witnesses or the attorneys in those cases. We have watched television, of course, grow up from its infancy and now into its maturity; and it is a news media. So I really do not see any justified reason why it should not be permitted to take its proper seat in the family circle. However, it will be under the strict supervision of the Court. I know there has been pro and con about televising in the court room. I have heard some say that it makes a circus out of the Court. I had the privilege yes-

terday morning of sitting in my home and viewing a sermon by the First Baptist Church over in Dallas and certainly it wasn't any circus in that church; and I feel that if it is a proper instrument in the house of the Lord, it is not out of place in the court room, if properly supervised.

Now, television is going to be televising whatever the scene is here. If you want to watch a ball game and that is what they televise, you are going to see a ball game. If you want to see a preacher and hear a sermon, you tune in on that and that is what you are going to get. If the Court permits a circus in this court room, it will be televised, that is true, but they will not be creating a circus.

Now, the most important point is whether or not it would interfere with a fair and impartial trial of this Defendant. That is the most important point, and that is the purpose, or will be the primary purpose of the Court, to insure that he gets that fair trial.

I want to lay down these rules on photographing, televising of any character of camera, that you will not be permitted inside the Bar with your camera. You must move outside the Bar, all of you. This gentleman here inside, except the one camera over here on my right. This gentleman here, I don't know who he is with—
[fol. 939] Gentleman: KRLD-TV.

The Court: KRLD. I am going to let you set yours up on the outside, just opposite from—over the Bar from where you are there, and this one camera over in this corner out of the way of the activities up here. To you who have cameras that make a noise, if at any time during this trial, any lawyer complains to me that the camera noise is interfering with him whatsoever, then you will have to cease using that camera because we are here primarily to try this case. There is not anything the Court can do about the interest in this case, but I can control your activities and your conduct here; and I can assure you now that this Court is not going to be turned into a circus with TV or without it. Whatever action is necessary for the Court to take to insure that, the Court will take it.

Under proper supervision, I am unable to see how it would prejudice the Defendant for the public to actually look in and get an eye-view of what is actually going on. They are going to be reading about it in the newspapers; they will be hearing about it on radio and I do not care [fol. 940] to discriminate between the news media; but I expect your cooperation to the fullest extent.

Now, further: there will not be any cameras, any photographs on the second floor of this court house, outside of this court room at any time. This Defendant is entitled to the protection of this Court in getting in and to the court without being molested or harassed in the least; and I am going to do my best to give him every protection that I think he is entitled to, at the same time recognizing the responsibility that the news media has to the public. I realize your responsibility but I want you to realize, on the other hand, that you too have a responsibility to this Court in cooperating with it, that the dignity of this Court will not be impaired or the decorum upset.

Now, from time to time, there may be other instructions necessary for me to give you along that line. There will be officers stationed along to see that this order is enforced, and I might add that this is an order of the Court, and any willful violations of it, you will be in contempt of court, in the hallways on this second floor or in here. The [fol. 941] jurisdiction of this Court does not extend beyond these corridors on this floor, being in and around in this court room.

So, I expect your cooperation to see that we have an orderly, conducted trial. If at any time during this trial, the privileges that I have permitted are abused, they will be withdrawn immediately because I say again, we are going to see that this case is conducted orderly and this Defendant gets every right that I feel he is entitled to. I am going to do my best to insure that.

Let me give you these further instructions:

At the request of the Defendant, I am going to ask that you that have press, radio or TV badges on, that you remove them and keep in your pocket to identify yourself

when called upon. It is suggested, of course, that that might give undue emphasis to the publicity of the case when they see that number of badges. I am going to grant that privilege, so put those in your pockets so that you may identify yourself when called upon to do so.

Mr. Cofer: Your Honor, we would like the opportunity of making some record with some testimony in connection [fol. 942] with this and we deem it probably proper for the Defendant to be here. If the Court will give us a short recess, we will call him. In the meantime, we have asked Your Honor's permission that we too might have a photograph of this array of cameras, that we can take pictures.

The Court: You may have; and while the court takes a recess for the Defendant to arrive, you that do not have your press, radio and TV badges, you will go across the hall to the District Clerk's office and pick it up, please, so that you may identify yourselves. Keep it in your pocket unless called upon to exhibit it.

Reporter's Note: Appearances are called for and given at this point in the record, as shown on Page 1.

The Court: Is that all of the appearances?

Mr. Cofer: Yes, sir.

The Court: There has been one consideration that the Court has given and it is that this is a small court room and there will be hundreds of people trying to get into this court room to witness this trial. I believe we would have [fol. 943] less confusion if they would stay at home and stay out of the court room and look in on the trial. With all of those people trying to crowd in and push into this court room, that is another consideration I have given to it.

How much recess do you think we should have?

Mr. Cofer: Just as soon as Mr. Estes gets here.

The Court: Fifteen or twenty minutes?

Mr. Cofer: Fifteen minutes.

The Court: Take fifteen minutes' recess.

Following Intermission, 10:50 A. M.

Mr. Hume Cofer: May it please the Court, we have some testimony to offer in support of our Motion that the cameras and television sound equipment be removed from the court room; and we first call Mr. M. E. Danbom.

M. E. DANBOM, being by the Court duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

[fol. 944] Examination.

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. M. E. Danbom, D-a-n-b-o-m.

Q. Where do you live, Mr. Danbom?

A. Here in Tyler.

Q. How long have you lived in Tyler?

A. Thirty years.

Q. What is your occupation?

A. Manager for Radio Station KTBB.

Q. Here in Tyler?

A. Yes, Tyler.

Q. Tell me what equipment and employees you have here in Tyler this morning, here in and next to the court room.

A. We have a news man, Chuck Foster, our Chief Engineer, Bob Wildman and myself in personnel. We have microphones in the court room here. The wiring to them is concealed and the microphones are on this witness stand—

Q. And on the Judge's Bench?

A. The Judge's Bench and there is one facing the table there for the attorneys when they address the Court.

Q. Where is your other equipment other than the micro-
[fol. 945] phones?

A. The equipment is in the anteroom, outside of the court room, to my right.

Q. Through this door next to the jury box?

A. Through the door to the hallway, yes.

Q. Now, that equipment of yours is right next to the door through which the jurors must pass in entering and leaving the court room in the jury box, is it not?

A. It is between the door and the corner in that room, yes, sir.

Q. Then in that other room, there is another radio system which has a desk with equipment on it?

A. That is correct.

Q. In the same room?

A. Yes.

Q. Would you judge the size of that anteroom to be about 10 x 10?

A. At least that,—I believe and perhaps a little larger.

Q. Now, tell me what the purpose of your radio equipment is and what will it accomplish?

A. We will broadcast the trial that has started here this morning.

[fol. 946] Q. Will you broadcast it live?

A. We plan to broadcast it live, and direct, yes, sir.

Q. Are we on the air now?

A. We are.

Q. What radio stations are receiving this broadcast through your equipment?

A. At the present time, only Radio Station KTBB. Others probably would be connected if they request it. We have agreed to feed any other stations that might want it.

Q. In other words, you will serve it to any other radio stations that contact you for a fee?

A. That is correct, so that only one microphone and one set of equipment would do for many.

Q. How many such tentative arrangements do you have?

A. No tentative arrangements. It is merely available if they request it.

Q. Will any of the major networks use your equipment?

A. We have had no requests for that, no.

Mr. Cofer: Your Honor, we would like for the record to show that Defendant did arrive before this testimony began [fol. 947] and has been in the court room during this part of the proceedings.

The Court: All right. Let the record be clear and show that Defendant has been here since Court reconvened after the recess and has been here continually since then.

Mr. Cofer: That's right. Mr. Bruce Neal!

BRUCE NEAL, being first duly sworn by the Court to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Tell me your name, please, sir.

A. Bruce Neal.

Q. Mr. Neal, what is your occupation?

A. Radio news reporter.

Q. Where do you live?

A. Fort Worth.

Q. By whom are you employed?

A. KXOL Radio.

Q. Are there other radio stations associated with or affiliated with KXOL?

[fol. 948] A. Yes, the member stations of the Wendell Mayes group.

Q. How many stations?

A. Six stations in Texas.

Q. Six stations in Texas?

A. Yes.

Q. How many people are here for those stations today?

A. There are two of us, myself and Ed Dunagan from our station KNOW in Austin.

Q. What equipment do you have?

A. We have a tape recorder which is hooked into the court room public address system, telephone equipment for feeding our stories from, the anteroom here, and that is the extent of our electronic equipment.

Q. What microphones do you have here in the court room?

A. The regular court room microphones, witness microphone and the microphone on the Judge's desk.

Q. During the recess, you went on the wires with a story about the proceedings here in the court room just before the recess, did you not?

A. Yes.

[fol. 949] Q. You will have another one—when does your next story go out?

A. One each hour.

Q. And your equipment is in this same anteroom here with Mr. Danbom?

A. It is.

Q. Through which the jurors must pass in order to reach the jury box and depart from the jury box?

A. I don't know that from my own knowledge.

Q. If you will, look around and notice the entrance to the jury box is immediately adjacent to the entrance to the room in which your equipment is located; is that a fair statement?

A. Yes, the jury box is adjacent to it.

Mr. Cofer: I believe that's all, Mr. Neal.

Mr. McGowen: No questions.

JIM PRATT, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

[fol. 950] The Court: Mr. Cofer, at this time, I am not sure the jury will be going through that room. Time will tell on that point.

Mr. Cofer: Later, the proceedings will indicate.

The Court: That's right.

Examination.

By Mr. Cofer:

Q. Your name is Jim Pratt?

A. That's right, sir.

Q. Mr. Pratt, directing your attention to the area of ingress and egress through the main door of the court room here, estimate, if you will, the number of people who are standing in the aisles between the entrance to the Bar and the main door.

A. I am pretty bad at estimating. I would say thirty to thirty-five, perhaps.

Q. Estimate the number of cameramen that you see from the entrance to the Bar and the main door of the court room.

A. All camera, sir?

Q. Yes, sir; any kind of camera.

A. Approximately, a dozen.

[fol. 951] Q. And the thirty-odd people or perhaps to the left that you mentioned between here and the door appear to be standing in the aisles; is that true?

A. Yes, sir. They are privileged spectators as far as I am concerned. I don't know.

Q. Where do you live?

A. I live in Dallas.

Q. And what is your occupation?

A. I am Operations Manager of WFAA-TV.

Q. In Dallas?

A. Yes, sir.

Q. Do you have some equipment here today for the purpose of this trial?

A. Yes, sir, we sure do.

Q. What equipment, first, tell me, do you have in the court room?

A. We have two television cameras. We have about four microphones.

Q. Where are your microphones located?

A. One of them, I think—I am not the technician on the job, but I think one of the microphones is here at the witness stand and the others probably at the Judge's desk. [fol. 952] There is one here before you, between you and the witness and there is one pointed towards the jury close to the camera.

Q. There is one here immediately in front of me, about five or six feet from my face; is that right?

A. That's correct.

Q. There is one at the edge of the jury box which extends to and over the Bar of the jury box; is that correct?

A. That microphone will probably be moved, yes, sir.

Q. You say that microphone will probably be moved?

A. Yes, sir. It probably will not be aimed directly at the jury box as it is right now.

Q. Is that a very sensitive microphone?

A. It is—I am sure I couldn't tell you, sir, being technical about it, but it is a pretty sensitive microphone, yes, sir.

Q. Who is the man in charge of your sound equipment who would know the technical details of it?

A. I would recommend probably Chris Irby, our Chief Engineer on the job.

Q. Will you ask him to come up when you get through?

A. Yes, sir.

[fol. 953] Q. Then, Mr. Pratt, in addition to the four microphones and two television cameras that you have here in the court room, what other equipment do you have in or near or around the court house?

A. We have a television camera on the sidewalk, sir. We showed some shots of Tyler this morning. We have a cruiser, mobile cruiser, that controls all of the cameras and microphones.

Q. That cruiser is a large moving van type vehicle, is it not?

A. It is approximately forty-one feet long. It would be in the order of a Greyhound bus.

Q. It is painted blue?

A. Yes, sir.

Q. And has the identification letters of your station on the side in large letters?

A. That is right, sir.

Q. And is parked in front of the court house now?

A. Parked to the side, yes, sir.

Q. To one side. Your cameras are located in the court room, are they not—one between the Bar and the end of the jury box?

A. That's right, sir.

Q. And one is trained on you now?

[fol. 954] A. I think it is.

Q. Is it broadcasting now?

A. It is hard to say, sir. We have killed the camera lights, sir, so we don't know which camera is on.

Q. Then there is another one in the other direction, to your left, on a high stand with a ladder at the other side of the court room?

A. Yes, sir. It is just a stand. That is the man's chair that I think you refer to as a ladder.

Q. That camera extends up about half the height of that window, does it not? About twelve or fifteen feet above the floor?

A. I would say ten feet, yes, sir.

Q. Ten feet above the floor. And there is a man standing there on the platform operating that camera?

A. Yes, sir.

Q. Now, that camera is several feet above your head and my head and looking down on us, is it not?

A. Yes, sir.

Q. It is arranged, is it not, so that it is possible for that camera to look down on and focus on the counsel table?

[fol. 955] A. Yes, sir, that's true.

Q. And it is entirely possible for that camera to take a close-up of pieces of paper and documents that are lying on the counsel table?

A. I doubt that, sir. I don't think that lens on there is that sensitive, but we could check that for you.

Q. It is arranged, is it not, so that it can take a picture, an accurate picture of what is on the counsel table and every gesture and motion of the Defendant and his attorneys?

A. Yes, sir, with some limitations, depending on the seating arrangements.

Q. Then, in the event that the angle of that camera is wrong, there is another camera in the other direction that can take the Defendant and his attorneys from that direction?

A. That is true, yes, sir.

Q. The camera on the other side of the room has to look over a corner of the jury box and past the jurors to be aimed at the witness box, does it not?

A. I think that is pretty clean, sir. I don't think the [fol. 956] jurors would be in the way there.

Q. You don't think the jurors would get in the way of your operations?

A. I don't mean that exactly, sir.

Q. Now, tell me something about the distribution of this news that you are putting out over those cameras; who will be using it?

A. Well, the facilities were made to all three networks.

Q. Which networks are those?

A. ABC, CBS and NBC.

Q. And they are all using these two cameras; is that correct?

A. Yes, sir, to some extent. Some of them will be taped and shown at later times. Others will probably be picked up and fed to their local points and what their use of it is, I don't know.

Q. It is possible, is it not, to put it out live to any of the networks who want to use it right now?

A. That is correct, yes, sir.

Q. And you are, at least, recording everything that is occurring right now?

A. Yes, sir. Right this minute, we are.

[fol. 957] Q. And you may be putting it out live right now to any one who wants to use it?

A. That is correct.

Q. You are not sure whether you are or not?

A. I dare say that we are putting it out live to WFAA-TV in Dallas and to the station here in Tyler, KLTU.

Q. So that, at least, two stations are on the wire live now?

A. That is correct, yes, sir.

Q. And perhaps more?

A. That is true.

Q. What is your estimate of the number of TV sets served by those three networks?

A. I would hate to hazard a guess, but it would be in the tens of thousands, I guess.

Q. Wouldn't it be in the millions, Mr. Pratt?

A. Including the network services, most certainly, yes.

Q. These cameras in this court room are arranged by cables so that, for practical purposes, they can reach every television set in this country, is that right?

A. That is true, yes, sir. I would say any stations served by network.

Q. Any station serviced by network?

A. That is true.

Q. I didn't ask you about your crew. How many people, how many employees are working with you on this project?

A. We have approximately fifteen people here, sir, give or take one or two.

Q. And that is sound people and camera people?

A. That is all inclusive. That is our cameramen, technicians, director, our microphone men, yes, sir, tape men.

Q. Now, there is a camera right by your large camera at the end of the jury box—

A. That is another gentleman—

Q. —not asking whether it is yours, but do you know anything about it?

A. No, sir, I do not.

Q. Do you know this gentleman, Mr. Duke, who is operating the camera beside you?

A. No, sir. He looks familiar but I don't know him.

Q. Anyway, that large camera will stand a foot or two higher than yours but is not a part of your equipment?

[fol. 959] A. No, sir, it isn't. I don't know of any film cameras or sound on film that we have in the court room, on either of these stations.

Q. One or two of your associates have cameras out here on film sound, don't they?

A. I don't know what you mean by associates, sir. You mean our affiliate networks?

Q. Some of these affiliated people who are affiliated in this pool?

A. Yes, sir, I think I met a CBS man here.

Q. CBS has a camera back here in addition to your pool facilities?

A. Yes, sir, that is true.

Q. You are making a permanent tape of everything that transpires here in the court room and goes out over the live wire?

A. Today, yes, sir.

Q. Would you ask Mr. Irby to come in?

A. Am I excused?

Q. Yes, sir; that is all the questions I have for you.

Witness excused.

[fol. 960] J. C. IRBY, JR. being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Cofer:

Q. Your name is J. C. Irby?

A. J. C. Irby, Jr.

Q. As you stepped up, Mr. Irby, how many cameras did you hear grinding?

A. Well, as I sat down in the witness stand, probably one or two.

Q. You could hear the click and the grind of the camera?

A. Yes, sir.

Q. From where you are now in the witness box?

A. Yes, sir; very low but I could detect it.

Q. Will you estimate the number of cameras of all types that you can see facing you right now?

A. Probably ten. Ten or twelve. That estimate may be a little high.

Q. What is your occupation?

A. I am Chief Engineer of WFAA Radio and Television.

Q. Is that in Dallas?

A. Yes, sir.

[fol. 961] Q. You live in Dallas?

A. Yes, sir.

Q. How long have you been with WFAA?

A. About fifteen years.

Q. Tell us what equipment you have here in the court room.

A. Well, the only thing we have in the court room are the two TV cameras and microphone on the Judge's Bench and one mike over by the jury box and this mike here.

Q. When you say this mike here, you are pointing to the one facing the witness stand?

A. Yes, sir.

Q. How many microphones including the Court Reporter's equipment do you see facing the witness stand?

A. There are four.

Q. And there seem to be four or perhaps five including the Court Reporter's on the Judge's Bench?

A. Yes, sir.

Q. And there is one in front of the witness box facing the counsel table?

A. Yes, sir.

[fol. 962] The Court: To make that clear, there are only three on the Judge's Bench. This (indicating mike) is my permanent one here. Only three others besides my own mike.

Mr. Cofer: I am sorry, Judge. I meant including the court equipment. Other than—I wasn't sure that was court room equipment.

The Court: That (indicating) is the Court Reporter's.

Mr. Cofer:

Q. Tell me what kind of microphone that is back there at the edge of the jury box with the snout about twelve inches long, sticking out from it.

A. Sir, that is an electro-voice six-forty-two microphone.

Q. What is its purpose?

A. More or less a directional mike. In other words, the pattern on that mike is a directional pattern, cuts out noises from behind the mike and picks them up in front.

Q. It is arranged so that it can be aimed or pointed in any [fol. 963] direction in the court room or to any place in the court room?

A. Yes, sir, it can. I am not familiar with how they intended to use this microphone.

Q. But it is fixed so that it can be aimed any way?

A. Yes, sir.

Q. And now, it is aimed at the jury box?

A. At the way it is aimed right now, I don't think it would get much of a pickup. It is possible.

Q. It is turned down right now about a couple of inches?

A. Yes.

Q. But the lateral direction is in the jury box?

A. Yes.

Q. For the purpose of picking up sounds in the direction in which that microphone is aimed, it is a very sensitive microphone, is it not?

A. Sir, it isn't any more sensitive than most microphones except for the directional characteristic. This is the type microphone we use where we have sound noises, etc. behind it.

Q. This microphone is designed to eliminate everything except the particular part that you want to hear?

[fol. 964] A. Well, let's say in a bi-directional pattern. In other words, the microphone can't be sharp enough to just pick up, say, your voice or one of the juror's voices. It will be probably—I would estimate 180-degree pick up in front of the mike, or maybe a little smaller than that.

Q. It is sensitive enough, is it not, and this microphone directly in front of me, is sensitive enough, is it not, that it is entirely possible that either of them or others could pick up what is said at the counsel table?

A. That would be a hard question to answer, sir. It would depend on the other noises in the court room, papers, shuffling, etc.

Q. I said that is a possibility?

A. It is possible, yes, sir.

Q. So that those that arrange conferences between Defendant and his attorneys could be recorded through those microphones?

A. I suppose it would be possible. That is all I could say on that.

Q. And your cameras, of course, are arranged so that they have the full scan of the room including the counsel table, witness box, jury box and the judge's Bench?

[fol. 965] A. Yes, sir.

Q. And it is possible for this high camera to my right and to your left to look down on the counsel table and to look down into the faces of the jury?

A. Yes, sir.

Mr. Cofer: Pass the witness.

Mr. McGowen: No questions.

INSTRUCTIONS BY THE COURT

Let me give these further instructions with this testimony. All of you cameramen and television, and the particular ones I have in mind, any time the lawyers are con-

ferring here at the table with their client, you shall not pick up their conversations. If it is necessary to cut your mike off or your television off, it is going to be necessary to do it. I do not want you picking up any conversation in conference with the attorneys.

MEMBERS OF PRESS CALLED

Mr. Cofer: Excuse me just a moment, Your Honor. [fol. 966] Rather than identifying on the witness stand each of the representatives of the press who are here, Your Honor, the attorneys for the State have suggested that I just state to the Court the results of my conversations with each of these gentlemen this morning as to their names and identification.

Mr. Danbon, who testified has with him, as he said, Mr. Chuck Foster and Mr. Bob Wildman of KTBB in Tyler.

Mr. Oscar Griffin is here from the Houston Chronicle.

Mr. Ed Dunagan and Mr. Bruce Neal are here from the main stations, six of them in Texas.

Mr. Norman Richardson is here from Shreveport Times.

Mr. George Connor is here from Tyler Courier Times.

Mr. Clyde Walter from the Amarillo Globe News.

Mr. Lee Webb from Amarillo, cameraman, from KGNT-TV Station.

Mr. Fred Pass from the Dallas Morning News.

[fol. 967] Mr. Finis Mothershead from Associated Press.

Mr. Ken Grant and Mr. R. R. Sullivan and Mr. Dan Robinson and Mr. Jim Pratt are apparently among the fifteen people associated with the television equipment. There is Mr. Dan Wrather, or Don Wrather, Dan Wrather, I believe, with the Columbia Broadcasting System, has a crew of three people here, with a stand-by camera and sound man; the cameraman's name is Mr. Rubenstein. They have what they call four-hundred equipped sound on film equipment.

The Court: What station is that?

Mr. Cofer: CBS, Judge. They have with them their pilot Mr. Hudson who flew them in here.

Wayne Hogan of Channel 7 in Tyler, the only one in the building at the time I talked to him. He says there are other representatives outside of the building.

Jimmy Banks of the Dallas Morning News.
 [fol. 968] Julius Dusché of the Washington Post.
 Homer Bogart of the New York Times.
 Paul Mehan, Channel 7, Shreveport.
 Bill Clayton, United Press International.
 Betty Kittrell was wearing a press card and assisting with the press.

"Jerry McNeill with United Press.
 Langston McEachern of the Shreveport Times.
 Bill Duke, KRLD in Dallas, film and sound only.
 Fred Kaufman, Associated Press.
 Tom Dillard with the Dallas Morning News, who was behind the Judge's Bench this morning taking pictures, while my partner was making our original Motion.
 Lee Webb, KGNT, Channel 4 Amarillo.
 Marybeth Vaughn, one word, Tyler Star.
 Bill Young, KDOK, Tyler.

Don Goodwin of the Los Angeles Times; and we would like the permission of the Court to add any others who [fol. 969] register with the Clerk, as I believe they have been asked to, that I may get a list of those. Those are just the ones here around in this immediate area of the court room this morning and does not include any of those outside of the building.

BILL DUKE, being first duly sworn by the District Clerk to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Cofer:

Q. Your name is Bill Duke?

A. That's right.

Q. You are with KRLD in Dallas?

A. Yes.

Q. And tell me what equipment you have here?

A. We have an Auricon sound on film camera, 600-foot magazine; we have two Bell & Howell 70-DR silent cameras.

Q. Now, is that camera, the one with the 600-foot magazine, standing just inside the Bar next to the pool television camera?

A. Yes, it is.

Q. Close enough so that there is barely room for one gentleman with a hand camera to stand between the two [fol. 970] pieces of equipment as he is standing there now?

A. That's right.

Q. Then just immediately behind is a gentleman leaning on the Bar with a still camera and immediately to the left of it another moving camera; do you know who he is with?

A. We met briefly outside but I do not know.

Q. And your camera is the one the Court referred to earlier when he was discussing the number of cameras and the amount of equipment that would be permitted inside the Bar?

A. And during the recess, I talked to the Judge and he gave me special permission to leave my camera where it is now.

Q. Just inside the Bar and between the Bar and the jury box?

A. In its present location and in the same location as it was before the recess.

By the Court:

Let me make this explanation why. He informed me during the recess that he hooked up the cable where he can't extend it and get on the outside of the Bar and that is the [fol. 971] reason I granted him special permission to remain inside.

Mr. Cofer: That is all. Thank you, Mr. Duke.

We offer the photographs which we took with the Court's permission of this equipment and attach those to the Bill.

The Court: That will be all right.

Mr. Cofer: Most of them I believe were taken in the Court's presence except possibly one or two which were taken outside of the building of the van that has been the subject of certain testimony, the cruiser.

The Court: That will be all right and you may make that a part of your Bill.

Mr. Cofer: Those are the photographs made by R. L. Faulkner at our request.

Reporter's Note: These photographs were never handed to the Reporter to be marked as exhibits.

[fol. 972]

RENEWAL OF MOTION RE PHOTOGRAPHY AND
COURT'S RULING THEREON

Mr. Cofer: Now, I want to state again, briefly, the Motion which we have already stated to the Court and ask the Court's ruling on it again, but I believe it might be appropriate to state again very briefly now that the Defendant is present in court for the purpose of following procedure.

Our Motion is that the Court rule and order that the large cameras, that all of the cameras, and at least, the large cameras and the noisy cameras be removed from the court room and that the television cameras be removed from the court room, that the news reel cameras be removed from the court room and that the sound equipment be removed from the court room, and that the court room itself be reserved altogether for the purpose of determining the guilt or innocence of the Defendant. We make this Motion on the grounds that the presence of this equipment, the subject of our testimony that was offered on the Bill, constitutes a prejudicial influence upon the trial and deprives the Defendant of due process in several respects.

First, we say that the presence of all of the equipment that is here deprives the Defendant of due process in this [fol. 973] trial in that it deprives the Defendant of adequate representation by his attorneys. It deprives him of an opportunity to consult with his attorneys at the counsel table accurately; it deprives his attorneys of an opportunity to properly represent him in that it interferes with their handling of the case; it interferes with their conferences between each other; it interferes with their thought processes; it interferes with their interrogation of the witnesses and their comments to the Court and to the jury, because it is distracting and because it invades the privacy of the counsel table; and for that reason, we say that this basic constitutional right to representation that is adequate

and proper representation by counsel is being infringed upon by the presence of all of this equipment in the court room.

Now, second, and perhaps more important. We say that the cameras and sound equipment deprives the Defendant of due process in that they distract the jury and they will prevent the jury from rendering a fair decision and giving fair consideration during the course of the trial to the testimony of the witnesses and the evidence. The noise of the [fol. 974] cameras and the presence of the cameras towering above the heads of the participants and as close to the jury box as two or three feet, and the microphones that can be directed into the jury box and hear the jurors cough or whisper, or any movement, that those things will distract the jury and make it difficult for the jury to render a fair decision with respect to the matters submitted to them.

Further, the presence of this equipment will lead the jury to believe that something particular is expected of them with respect to this case and the fact that the jury will be aware that there are millions and millions of people all over the United States watching what these twelve people are doing will deprive the Defendant of an opportunity for a fair jury trial in this case.

Now, third, and most important perhaps is the danger to the proper presentation of the evidence. We say, Your Honor, that the Defendant will be deprived of a fair trial if this equipment is permitted to stay in the room because each witness will be put on the witness stand in front of four or five microphones, in front of a dozen cameras, some of which are directed to millions and millions of people [fol. 975] right now, live, that this is bound to have some distracting effect upon the witness, is likely to cause the witness to be confused in his answers and give inaccurate answers, or improper answers, or conceivably even untruthful answers. We say that the presence of this equipment will deprive the Defendant of a fair trial because of the effect on the witnesses, on the jury and on counsel, and we ask the Court's ruling upon this Motion.

The Court: Overrule the Motion in so far as it applies to the court room, with instructions that I have heretofore

given and are a part of the record. I will not repeat them at this time unless you deem it necessary that I repeat them.

Reporter's Note: Mr. Cofer nods to Court.

The Court: Mr. Cofer says it is not necessary that I repeat them.

Now, some complaints have been made that some of you working here are talking. I have not been able to hear you up here but do not talk among yourselves because that [fol. 976] would be disturbing just as badly as if the spectators out there were talking. It may be necessary later that I ask the noisy cameras to remove from the court room or be still. That may be necessary at a point; maybe not too far off, and I may have to do that.

As I said awhile ago, we are interested, first, in seeing that this case is properly tried and this has not been an invitation affair except for the jurors and the witnesses. I have not invited TV here; I have not invited newspaper reporters here or radio people, or photographers, but they have responsibility to the public and they are here, and the Court is going to be just as tolerant and as fair and understanding as he knows how with your problems, but at the same time, you must be understanding of mine. It may be necessary that some of the equipment later will have to be removed from the court room.

Mr. Hume Cofer: We want before the Court rules on our Motion, one observation about the jury. I did not mean to interrupt but want this in before the Court rules.

The Court: Do you want me to finish my ruling? [fol. 977] I have already ruled on the court room and I will finish my ruling.

Now, outside of the court room, I am sustaining the Defendant's Motion. There will not be any photographing or any pictures of any kind by any character of equipment on the second floor. That is this floor of the court house, or within the court room, except what you will do under my rules and regulations. That will be prohibited now on this floor.

This inside the Bar here is reserved for the lawyers and the Defendant. Of course, the jury over there in the box and I don't want that area disturbed. We have one table

over here to my left for as many of the press men as can be seated there. I don't want any one else over in this area while this trial is being conducted. That is our working area and we are not going to be disturbed in that area. Any time that I find out there is any equipment that is disturbing the jury or any one else, the Court will take the proper steps to eliminate it.

Did you have something else you wanted to say?

Mr. Hume Cofer: We want to add to our Motion the observation that the presence of this equipment is likely [fol. 978] to and probably will emphasize to the jury that the press of public opinion on the case and on the jury will lead the jury to lend, in its decision, a certain amount of weight or in some way at least to public opinion on the matter and lead the jury to base its opinion perhaps more upon popular appeal, popular prejudice than upon the evidence and instructions of this Court; and we add that to our Motion and we understand that the Court has overruled our Motion, as the Court has stated, to which action of the Court, the Defendant excepts.

The Court: Overruled in part and sustained in part.

Mr. Hume Cofer: With that as modified, we do take exceptions to the ruling of the Court as modified by the Court.

The Court: I do not feel—of course, if I did, I would sustain your Motion in its entirety, but because the trial may be televised to the outside public it would cause a juror to more—or less likely to find the Defendant guilty or not guilty. If I did, I certainly would sustain the Motion. I feel that we can select twelve men and women of [fol. 979] this County who will try the Defendant and decide his case on the law and evidence submitted in this court, and they will be qualified to do such; and I believe you can rely on the citizens of this County to live up to their oath.

That is all of the preliminaries before the trial.

Now, at the State's request, the first case to be called this morning will be State of Texas versus Billie Sol Estes, in Cause No. 16,818 on the Criminal Docket of this Court. What says the State?

[fol. 983] .

TUESDAY, SEPTEMBER 25, 1962, 9:00 AM

The Court: You gentlemen with cameras, I don't think you understood entirely my ruling yesterday on your activities. The Court does not want you at any time to come behind this Bar and take any pictures. This is reserved entirely for the Court, the lawyers and others that are necessary participants in this court proceeding.

When we recess or before convening in the morning or after five o'clock when court adjourns, these gentlemen many times want to sit here a few minutes and talk without being interfered with. So now I intended yesterday, and I want to make it clear this morning, that not at any time will you come on this side of the Bar and take any pictures. Mr. Bailiff here will see that that is enforced and any one who attempts to violate it, bring them before me.

Ladies and Gentlemen of the Jury, as the Clerk calls your names, answer out in a clear voice where we can hear you up here.

Reporter's Note: The jury is called, sworn and instructed to report back into Court at 1:30 P. M.

[fol. 983] Mr. Cofer: Mr. Pratt!

Recall of JIM PRATT for further interrogation.

By Mr. Cofer:

Q. Your name is Jim Pratt?

A. That is correct, sir. Jim is a nickname, but it will do.

Q. You are Operations Manager for the television operation of WFAA-TV?

A. That is correct.

Q. And you testified yesterday?

A. That is correct, yes, sir.

Q. On a Motion in this court room?

A. Yes, sir, that is true.

Q. You testified yesterday that your television cameras were taking and producing live TV show here in Tyler and in Dallas?

A. Yes, sir. That's true.

Q. And that was broadcast live here in Tyler yesterday during the day and in Dallas?

[fol. 989] A. Yes, sir; that is a fact.

Q. Then last night, you had out in your cruiser, that you referred to in your testimony, which is a large Greyhound bus van sort of thing beside the court house, you took that tape, did you not, and edited out the recesses and the delays during the day?

A. Yes, sir, that's true.

Q. And you spotted out KRLD?

A. Yes, sir, that's true.

Q. Then you took that tape as thus edited and what did you do with that?

A. We played it back last night at 10:40.

Q. How did you go about playing that back?

A. We took the edited tape back to the Station—

Q. Back to which station?

A. Back to WFAA-TV in Dallas and broadcast it there.

Q. Did you yourself take that tape to Dallas—

A. Yes, sir, that's true.

Q. —last night? About what time did you get to your Station?

A. About a quarter to ten.

Q. Then you put it on the air at 10:40?

[fol. 990] A. Correct.

Q. And then you and your crew came back here this morning to begin this hearing this morning?

A. I was the only one who came back this morning.

Q. And it was substituted from 10:40 to about 12:40 for a delayed show, was it not, on your Station—a late movie?

A. I believe that's correct. Sir, I went to bed early. I didn't see the program myself.

Q. But you do know that it was broadcast?

A. Yes, sir.

Q. With the usual interruptions for commercials during the broadcasting?

A. That is correct, yes, sir.

Q. Now, this morning, you have all of your equipment back and in place and operating?

A. Yes, sir.

Q. And what stations are broadcasting the product of your work this morning?

A. I have no way of knowing. I was here all day yesterday, and as far as I am concerned, my statement yesterday will have to hold. I didn't get to talk to any one about it at the Station. I got in quite late and got in here early [fol. 991] this morning.

Q. Is the Tyler Broadcasting Station broadcasting these proceedings this morning?

A. They were yesterday. I didn't check this morning. I assume they are, yes, sir.

Q. And WFAA is broadcasting it live this morning?

A. Yes, sir.

Q. This morning you were in the room when the jury was sworn in, were you not?

A. Yes, sir; I was called just prior to that.

Q. And when the jury was being sworn, there were a number of cameras turned on the jury?

A. Yes, sir.

Q. Was your camera on this side of the room, on my right and your left, one of the cameras that was being turned on the jury?

A. I am sorry, sir, I couldn't see. I was back in a corner.

Q. But you did notice a number of cameras that were being turned back towards the standing jurors who were taking the oath as jurors?

A. The film cameras, yes, sir.

Q. Last night when the broadcast was transmitted from 10:40, after 10:40 from WFAA in Dallas, that broadcast [fol. 992] was carried live by WFAA-TV and by the local Tyler television station?

A. That is my understanding, yes, sir.

Q. Do you know that there is a cable that serves Tyler television sets which enables Tyler television sets to pick up WFAA-TV?

A. Sir, I don't really know the technicalities of how the pictures are relayed here. It is either cable or microwave and I am not sure.

Q. But they do get it here?

A. Yes, sir, they do. You are referring to our pictures from Dallas?

Q. Referring to the transmission of last night of the replays of the proceedings of this trial.

A. On our Station?

Q. On WFAA-TV?

A. Yes, sir, that's true.

Q. And that was Tyler television sets could receive and did receive it?

A. From either ours or the Tyler station.

Q. From either WFAA-TV or from Tyler?

A. Or from KLTU in Tyler.

Mr. O'fer: Pass the witness.

[fol. 993] Mr. McGowen: No questions.

[fol. 994]

[File endorsement omitted]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

THE STATE OF TEXAS,

vs.

BILLIE SOL ESTES.

STATEMENT OF FACTS ON PRELIMINARY MOTIONS AND VOIR
DIRE OF THIRTY-TWO-MEMBER JURY LIST—October 22, 1962

[fol. 995] Be It Remembered: That heretofore, to-wit, on the 22nd day of October, 1962, there came on for trial the foregoing entitled and numbered cause, whereupon the following Preliminary Motions, Testimony on Change of Venue and Voir Dire of the 32-Panel Jury List were ad-
duced, to-wit:

[fol. 996]

October 22, 1962

INSTRUCTIONS BY THE COURT

I want to make this statement about cameras in the court room. Any of you that have TV cameras, it will be necessary that you go back and get in the TV station back here for that purpose. Don't—there will not be any allowed anywhere else; so if you have any shots that you want to make, go back in the place for you back there.

Now, you who are with the Press, I want you to remain as stationary as possible. Don't be moving around any more than absolutely necessary where you will be in the disturbance of this court.

So all of you now who want to take TV cameras, go back behind there. You will not be allowed anywhere else. I want to point out that there will be no flash bulbs allowed; there will be no flood lights allowed, and there will not be any cameras allowed on this side of the Bar at any time. That means recess; that means after we adjourn or before court convenes in the mornings. These parties here, I don't [fol. 997] want them disturbed. They are here on serious business; and when we take a recess, many times they want to sit here and talk. So I don't want any cameras behind this Bar; I don't want any back in this ante-room, shooting from that angle and there will not be any cameras allowed on the second floor out of this court room at any time.

Now, those are the orders of the Court and any violation of them, you will be in contempt of court. I want to inform you now that I intend to strictly enforce them and I hope you understand what I mean. Now, any other shots from TV, you get behind there where you should be.

I am going to call the cases for announcement.

MOTION RENEWED TO BAN CAMERAS, ETC.

Mr. Hume Cofer: Your Honor, before the case is called, we have one preliminary matter that we want to mention to the Court.

We want to renew now our Motion that cameras and all sound equipment be removed from the court room, still cameras, movie cameras and television; and all radio facilities. We want to renew that Motion that those facilities

[fol. 998] be removed from the court and we want to offer some evidence in support of that Motion, on the renewal of that Motion, either now or at a time convenient to the Court.

The Court: We will take it up now so that we can get it behind us.

Offered on Motion by Defense Counsel

Mr. Hume Cofer: May I be sworn, Your Honor? (Oath is administered to witness by the Court).

HUME COFER, being by the Court sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is Hume Cofer. I am one of the attorneys for the Defendant. I reside in Austin, Texas. I am an attorney, licensed to practice in Texas.

In connection with this Motion to exclude the cameras from the court room, I state to the Court that I can hear the cameras at the back of the room now and that the noise of the cameras is a distracting matter. I state to the Court that [fol. 999] the presence of the cameras and the clicking of the cameras and the grinding of the cameras in the back of the room constitutes a distraction and that it interferes with the handling of the case in the representation of the Defendant, in my opinion. I state to the Court that the presence of the cameras interferes to some extent, in my opinion, and our reaction to the handling of the case through our conferences with the Defendant in the court room and to our conferences with witnesses and the other attorneys, and with The Court in the court room.

Is there anything else, Dad?

Mr. John D. Cofer: And the fact that the witnesses face the cameras and the jury will face the cameras.

Mr. Hume Cofer: I notice as I sit here in the witness box that a witness from this position faces four large cameras at the back of the room and three microphones here in the room; and I notice that the—from the position of the jury box on the right, the jurors face off to the right of the jury [fol. 1000] box, the booth which has been constructed since the last hearing for the cameras in the back of the room.

Examination.

By Mr. McGowen:

Q. Do you hear any cameras clicking right now?

A. I do not hear any clicks; I do hear a grinding or humming noise.

Q. Now?

A. Yes, sir, I do.

Q. Right this minute?

A. Right this minute.

The Court: That is the air conditioning now.

Witness: Well, it wasn't present at the September hearing when the weather was much warmer, I believe, Mr. McGowen; the noise which I hear now, I did not hear then.

Mr. McGowen:

Q. Do you see any cords on the floor?

A. No.

Q. Is there any difference today than it was the last time we were here, with respect to locations of any of these [fol. 1001] offensive cameras?

A. Yes, I should say so. The publicity that was given this trial on the last occasion and the number of cameras here, I think was sufficient to spread the news of this case throughout the county, to every available juror; and it is my opinion that on that occasion, there were so many cameras and so much paraphernalia here that it gave an opportunity for every prospective juror in Smith County to know about this case.

Q. Not about the facts of the case?

A. No, sir; not about the facts, nor any of the evidence.

Q. Now, I would like to ask you, Mr. Cofer, about the physical arrangement now as opposed to then—of the cameras I am talking about?

A. Yes, sir.

Q. Would you say that the cameras are located in the rear of the court room behind a panelled screen?

A. They are behind a panel structure and through an opening in the structure.

Mr. McGowen: No further questions.

[fol. 1002] JOHN D. COFER, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

My name is John Cofer. I am, at least, senior in years, of the attorneys who are representing the Defendant in this case. I practice law in Texas—now forty-one years. I have a law degree; I am a licensed lawyer to practice in Texas, in the Supreme Court of the United States, in the Fifth Circuit, and in all of the Federal District Courts Divisions in Texas. I am a member of the American Bar Association and have been a member of the American Bar Association for—in excess of thirty years, I believe. All members of my firm are members of the American Bar Association.

Mr. McGowen: Your Honor, the State will stipulate that Mr. Cofer is a qualified trial lawyer.

Mr. Cofer: The matters I am going to talk about, Your Honor, have nothing to do with my qualifications. The matter [fol. 1003] of my qualifications is a matter for my client alone and not Mr. McGowen.

To me, it is highly distasteful to be forced to defend a man in a criminal case where cameras are trained on me during the trial or any part of the trial. I believe sincerely in Canon 35 of the American Bar Association which prohibits photography or cameras in the court room.

At the previous hearing in this case and since that time, I have given very serious consideration to asking the Court to relieve me from the necessity and duty of defending the Defendant in this court room in this case. I have consulted, with reference to that, with my client, my associates and with other attorneys, since it was a personal matter; and I have reached the conclusion that to make such a request not only would be—result possibly in delaying the trial of this case but that it would have the effect of featuring this trial upon me personally and might be construed as an effort to obtain some personal vindication and publicity in the [fol. 1004] trial. So, I have come to the conclusion that I am not justified in going to that extreme and so embarrassing this Court by refusing as an attorney to participate in something that violates my code of ethics very much.

To me, it is so highly improper for a lawyer, The Court, or any judicial proceedings to proceed under this character

of publicity. I have a feeling that the First Amendment. I believe it is, of the Constitution of the United States, which guarantees a man a public trial is for the benefit of the Defendant and that nobody else has any rights thereunder or has any interest in this trial. There are just two people, the State of Texas and the Defendant, that have interests and officers whose duty it is to administer and see that justice is performed. So far as educating the public or informing the public of what is going on here, I think that that is wrong. I think this trial should be conducted between the State of Texas and the Defendant with the permission of those who can and are interested to come to this court room without any unusual method of spreading this [fol. 1005] case out to the public.

This situation that I am put in seriously interferes with me in rendering my best services to my client. The fact that it outrages my personal ethics, colors my feelings and makes it difficult for me to—to the extent that I feel I should, wisely pass upon the rights of the Defendant in this case. I do not think that I should be required to undergo a trial of this kind, of this publicity.

Mr. McGowen asked a little bit about the change in the manner in which the cameras are presently in the court room over the last time. I would say it has been substantially cleaned up. The noise has not been reduced. Though I am not particularly sharp of hearing, I can hear whenever the news cameras are grinding, I can hear the grinding. It distracts me, but most of all, as I sit here in the witness stand, this court room doesn't look like a court room to me; it looks like a moving picture theater. I see in the back of the court room what seems to be permanent construction because the wood is blended with the panelling of the court [fol. 1006] room, and it looks like a theater and this trial has assumed to me a character of proceedings to entertain and instruct the public rather than determine the guilt or innocence of the accused. The cameras, one, two, three, four, five—I see in the booth now, shine out of the booth just as cameras do at a moving picture show proceedings in a theater. It is like the defendants of Perry Mason's. The trial of Mary Duggan who was put on in my youth as a play, and I think that is wrong, and, in addition to that,

these mikes—I don't know where they go but in so far as the privacy of the testimony of the prospective jurors and the witnesses is concerned if these microphones picked up what they say, it will go out to the public and will eventually get to the witnesses and other jurors and enable them to form their answers. It impresses the jury that this is an unusual case in which the public who is listening and watching is expecting them to do some particular thing.

I know that it will interfere with my argument in this case. I have read in the press that the Court is going to [fol. 1007] permit the taking of pictures during the argument, and I shall ask specifically with reference to my argument and that of my associates who argue that their pictures not be taken while the arguments are proceeding.

Having stated my position and one that I believe in very firmly, I will say that I have never consented, voluntarily, to any pictures in the court room during the long years of my practice, and, in only one case were pictures taken, and I always regretted that. I was overruled by my client, who was seeking publicity, and I think the publicity that he got was one of the large elements that resulted in his conviction and him being one of the few men that I have defended who served any time in the penitentiary.

I believe that is all.

Mr. McGowen: No questions.

↑
MARSHALL PENGRA, witness called in support of Motion being first duly sworn to tell the truth, the whole truth and [fol. 1008] nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. Marshall Pengra.

Q. What is your occupation?

A. I am General Manager of KLTV, the local television station.

Q. Tell us what facilities of your local television station are in the court room this morning.

A. We have one electronic sound on camera that is in the aperture at the back.

Q. The electronic sound on camera is a piece of equipment which takes film and sound; is that correct?

A. Yes.

Q. Is it broadcasting now or is it reducing the proceedings to a picture which can be broadcast later?

A. That is what it is doing. It is reducing the proceedings presently on film with sound.

Q. With sound?

A. With sound.

Q. And so that that moving picture and that sound can [fol. 1009] be transmitted by your station at a subsequent time?

A. That is correct.

Q. Do you know whether any television facility is broadcasting now live?

A. To the best of my knowledge, no, there is no television facility that is broadcasting from this court room where it is then being telecast live and simultaneously; no.

Q. Do you know whether any radio station is doing that?

A. No, I don't have that information.

Q. Does your station have a radio transmitter?

A. No.

Q. You are only television?

A. Right.

Q. What other cameras are located in the back of the room in the structure which has been built there, Mr. Pengra?

A. Under the Judge's ruling, it was provided that the three television networks to be allowed representation with sound on film cameras at this point in the proceedings, and as I understand it, the three networks affiliates from Dallas [fol. 1010] are present and using the same type facilities that we are, in the terms of film and sound.

Q. Will the film and sound which you are taking be available for any other station—any other television station?

A. You mean for our particular camera?

Q. Yes, sir.

A. No. However, the film that is being taken by the representatives of the network is to be available on a pooled basis from Dallas.

Q. How many of those cameras are there representing the networks?

A. Three.

Q. And that will be—those films will be available on a pooled basis to all of the stations of each of those networks?

A. Well, technically, they would be on a pooled release to any station which shows an interest would be able to contact one of the three stations in Dallas to make its own arrangement.

Q. What networks are those that are—that have facilities in back of the room there now?

A. ABC, NBC and CBS.

Q. And they have, as you suggested, film and sound, each [fol. 1011] of those does?

A. Yes.

Q. And your station has a fourth camera which has film and sound?

A. This is under the arrangement as provided by the Judge's ruling, that three networks would be allowed facilities and the local station would be allowed facilities.

Q. Are you familiar—you have mentioned a couple of times the Court's ruling on this matter—I believe that was made by way of a statement to the news media, was it not?

A. I understood it to be a combination of ruling and statement, yes.

Q. Tell me whether or not, according to your recollection of that statement, this paragraph was included in it, beginning at the point I am indicating here and going down through here?

A. Will you state your question again?

Q. Do you recall that that paragraph was a part of the Court's statement and decision on this problem of cameras?

A. No, I don't recall that that was part of that particular statement because there have been several statements.

[fol. 1012] Mr. McGowen: Your Honor, with respect to the Court's ruling in this matter, I think it would be more expeditious if Mr. Cofer asked the Court what the Court's ruling was.

Mr. Cofer: We will just state to the Court and it may be stipulated as you suggest, Mr. McGowen, that a copy of the news release that we saw states "If the Judicial Section of the State Bar of Texas meeting in Austin on October 5th and 6th, does not adopt Rule 35 of the Canon of Ethics, of the American Bar Association, and continues to permit each Judge to conduct his court and control his court room as he deems right and proper, as long as the law is complied with, in that event each television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis"; and what we are trying to do is to offer in evidence that portion of the statement.

[fol. 1013] Mr. McGowen: We object to the introduction of anything. I don't know whether this is the Court's statement or not. Let me look at it. (Counsel is shown instrument). We have no objection to Your Honor's ruling being put in evidence but that is evidently a mimeographed copy or something from a newspaper.

The Court: I will be glad to furnish you with a copy of my statement later and you can put it in the record in full.

Mr. Hume Cofer: That will be fine, Your Honor, and that will be more accurate. The thermofax is marked "D-1" and we will substitute that, if we may.

The Court: That will be all right.

Mr. Cofer:

Q. Mr. Pengra, do you know who constructed the structure in back of the court room?

A. Before I answer that, may I make a comment regarding this matter that you have just raised?

Q. Is it concerning the question that I asked you about [fol. 1014] that paragraph, Mr. Pengra?

A. It is concerning the wording and the fact that there were a number of releases as far as news was concerned, and it involved the rule 644 of the Texas Code of Criminal Procedure.

Q. I believe we will not need that now, thank you, sir. I do want to ask you about that structure at the back of the room; who built that? Do you know?

A. Yes. Members of my staff constructed that.

Q. Of the Tyler Television Station?

A. Correct.

Q. And by whose authority and with whose permission?

A. Under the direction of the Judge as to what area to be serviced, the type of structure to be handled.

Q. So that it is fair to say that the structure in the back of the court room was put there and constructed and built there by the Tyler Television Station with the authority and permission of the District Judge who is presiding in this case?

A. We talked at considerable length with the Superintendent of the building; we conferred with Judge Dunagan in this matter; we made complete revelation of plans as far as structure was concerned and submitted it to them and solicited their approval.

Q. Did they give that approval?

A. They did.

Q. The building superintendent and Judge Dunagan?

A. Yes, sir.

Q. In order to put that structure back there, was it necessary to remove any of the permanent seats in the court room?

A. No.

Q. Was the back pew removed or just moved forward?

A. There were two benches that were immediately at the left rear of the court room as I face it. One was moved in the front on this side and the other was moved in the front on the right hand side and the total seating capacity of the court room as furnished by permanent bench structure has not been changed at all.

Q. So those two benches were moved up next to the Bar?

A. Correct.

[fol. 1016] Q. During the September hearing, Mr. Pengra, it is true, is it not, that your station—is it KLTV?

A. Correct.

Q. KLTV transmitted from the court room the proceedings live and simultaneously?

A. That's true.

Q. At breaks in the proceedings and at intermissions or pauses in the proceedings, state whether or not your station

would interrupt the transmission of the court room proceedings to insert commercials?

A. Yes. At certain breaks in the proceedings where the actual activity was just—in the court room had been suspended, we instituted there a practice of inserting those commercials which normally occupied that time period within our regular daily operations.

Q. And, of course, you charged the companies or people who purchased those commercials you normally charged for that time?

A. Yes, we did.

Q. And that was a profit enterprise of your station, those commercials?

[fol. 1017] A. Those commercials that are carried on our station are aimed to be a profit enterprise.

Q. Then the purpose in transmitting it—in transmitting the proceedings here is not for the education and instruction of the public?

A. I would say that was your interpretation and mine would be exactly the opposite.

Q. Now, on the occasion of the September hearing, during the evening, Monday evening, September the 23rd, I believe it was, wasn't it, your station played through again substantially the entire proceedings?

A. I can't recall the exact number of minutes that we devoted to the play-back of the tape, a portion of the tape that was taken during the day; and whether you could say substantially, I would have to get that information and find out exactly the number of minutes that were carried. It was a lesser version than the live.

Q. I would like to ask you this: where did you obtain—what was the source of that evening transmission on September 23rd?

A. That transmission originated with WFAA in Dallas. [fol. 1018] Q. If you transmit—did you transmit on that evening everything that WFAA transmitted—that is September 24th we are talking about; that Monday, September 24th, on that evening, did KLTV transmit everything that WFAA—everything of the court proceedings that WFAA transmitted?

A. Yes, we did.

Q. Now, you substituted that transmission on that evening, did you not, for your late picture show?

A. We do not carry a late picture show. In this particular case, it was substituted for a program known as the "Tonight Show".

Q. Tell me whether or not during the evening of the proceedings—that were being broadcast, you interrupted the broadcast from time to time to insert and transmit commercials?

A. We did not interrupt the broadcast, as you state, Mr. Cofar. At places where there would be a cessation in the proceedings and where there would be normally a pause, there were insertions of some commercial material of that [fol. 1019] which usually appear during that time in our schedule.

Q. Now, this film that you are making today, that your station is making and that three other stations are making, will be used, will it not, in the same manner; that is, it will be used by the stations which acquire and transmit it in between commercials and around commercials?

A. No, I don't believe that is the way it will be used. I think that on our station, it will become a part of the film clips—what we call film clips in our news and it will be handled under our standard format of our news presentations. As far as our station is concerned, this is not a filming of a sequence to be carried. It is our intention to use this as film clips within our news.

Q. This film—those films when will they be ready, these that are being taken now, when can they be transmitted?

A. The ones we are taking now, barring any kind of an accident, as far as our pickup is concerned, will be available on the six o'clock news this evening.

[fol. 1020] Q. And will probably, at least, parts of it will probably be transmitted during—here in Tyler on the six o'clock news this evening?

A. Yes.

Q. And will be available to be used by witnesses and jurors who may be watching television at the same time?

A. Certainly, if they are here and viewing.

Q. Witnesses and jurors in this case who might be watching will have an opportunity to view it this evening?

A. If they can look at a television set, they could certainly see it.

Q. Tell me where the microphones are that pick up the sound that are being used by the television facilities.

A. It is my understanding, there is one microphone there (indicating)—

Q. On the Judge's Bench?

A. Yes; and two of those, as I understand, on the Judge's Bench are part of the court equipment, as you can see the lines coming down here to the soundscreeber and over here on this side. So, there is one microphone which is servicing [fol. 1021] all of the cameras at the back of the room, from there; and I believe, but I am not sure, but I think this is one.

Q. The black one in front of the witness box?

A. Yes.

Q. It is your impression, then, that all four of the television facilities are using the same two microphones here on the witness box and on the Court's Bench?

A. That is my belief, and I think it ought to be checked, however, because I am not sure exactly of what the mechanical arrangements are.

Mr. Cofer: Pass the witness.

Mr. John Cofer: Could we find out if the State is opposing television or in favor of it? What is the position of the State?

Mr. Maloney: It is within the discretion of the Court.

Mr. Cofer: Then you are not joining in on opposing it?

Mr. McGowen: We are not joining in any of your Motions, Mr. Cofer. [fol. 1022]

The Court: Let's proceed with this Motion, Gentlemen, and move on. I want to get through with it.

Mr. Hume Cofer: I have no further questions for Mr. Pengra.

Mr. Maloney: Your Honor, we would ask the Court if it is possible while this witness is on the stand to have a picture made of this area? I am sure counsel would like to have it for their Bill and we have no objections to pictures being made under the directions of the Court.

The Court: I have granted the Defendant the right before to make pictures of the set-up and the State will have

the same right. If you have any one you want to take those pictures now, you may have him come forward.

Reporter's Note: A number of pictures are being taken from different views in the court room by Ferd Kaufman with AP and Jerry McNeill with UPI.

Recall of Marshall Pengra for Further Questions.

[fol. 1023]

By the Court:

Q. Mr. Cofer asked you a few moments ago about who built the stand back there for TV and I believe you said that you built it, or your station built it?

A. Staff members was my understanding.

Q. Was it built entirely at your expense?

A. Yes, sir.

Q. And the tax payers of this County have not been out a penny on it?

A. That is correct.

By the Court: That is what I want to know.

Witness: Could I ask a question?

The Court: That will be all right.

Witness: On the original Motion wherein you requested that the cameras are to be kept out of the court room, did that include newspapers' cameras as well? Is this all cameras?

Mr. Hume Cofer: Our Motion applies to all cameras, still [fol. 1024] and movie.

The Court: It includes all of them.

FERD KAUFMAN, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination:

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. Ferd Kaufman.

Q. What is your occupation?

A. I am photographer for the Associated Press in Dallas.

Q. How long have you been with the Associated Press?

A. Five and one-half years.

Q. You are here now covering this trial?

A. Yes.

Q. What equipment do you have?

A. I have two cameras, 35mm type, as you see.

Q. One has a long lens on it and what is the purpose of that lens?

A. It is a telephoto lens, Mr. Cofer, which allows bigger images from further distance.

[fol. 1025] Q. A moment ago the State requested and the Court admitted the taking of pictures of the structure in the back of the court room and you volunteered to take those and you have done so.

A. Yes.

Q. You will have those pictures available for the use of the State in showing the set-up in the back of the court room?

A. Yes, sir; and I also assume we will use them, if we so desire.

Q. That then will be available to the Associated Press?

A. That's right.

Q. How many people are here with Associated Press?

A. Present in the court room, there is myself and a reporter.

Mr. Hume Cofer: Pass the witness.

Examination.

By Mr. McGowen:

Q. I would like to ask you, Mr. Kaufman, did you take one of those pictures from the jury box?

A. Yes, sir; I took it from that second step back there.

[fol. 1026] Q. Which would be the view that the jury sitting in the jury box would have of the structure in the rear?

A. Yes, sir.

Q. Did you take one from the witness stand?

A. Took one from behind the witness stand.

Q. Which would represent the view the witness would have of the structure in the back?

A. Yes, sir.

Q. Did you take one from the Judge's Bench?

A. Yes, sir.

Q. Which is the view the Judge would have from the structure?

A. Yes, sir.

Examination.

By Mr. Hume Cofer:

Q. First, as you look at me and my co-counsel, if you look directly over our heads, the line of vision is directed towards those cameras, is it not?

A. I can see them, Mr. Cofer.

Q. It is in a straight line behind me?

A. That's right.

Q. Now, if you were seated in the jury box and you were looking at those cameras, it would not be possible for [fol. 1027] you to see the witness, would it?

A. I don't know, Mr. Cofer. I haven't sat down in the jury box.

Q. You took pictures from over there, didn't you?

A. What I see through this camera would certainly not be exactly what the eye is going to see.

Q. Isn't it fair to say that if you are in the jury box under tension and your vision were attracted to the structure at the back of the room, that you would not be looking at the witness? I am just trying to show the physical layout. The cameras are in such place where a juror couldn't see the cameras and the witness at the same time; isn't that a correct statement?

A. No, sir, I don't think it is a fair statement.

Mr. Hume Cofer: That is all.

Mr. McGowen: No further questions.

By the Court:

The cameras are facing east and the jurors would be facing south; and if they look to the west, I would think [fol. 1028] they would have to turn their heads to the right to do so.

JERRY A. McNEILL, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. Jerry A. McNeill.

Q. Mr. McNeill, what is your occupation?

A. I am a news photographer with United Press International in Dallas, Texas.

Q. How long have you been with United Press International?

A. Nine years, next month.

Q. How many people are here from UPI?

A. At the present time, there are—just myself, I believe. The Reporter has just left the room.

Q. You do have a reporter here?

A. There is a reporter here, yes, sir.

Q. When the gentleman from the Associated Press volunteered to take the pictures of the structure in the back of the room, state whether or not you stepped up to the Bench [fol. 1029] and requested an opportunity to take pictures from the same angle of the same things.

A. I requested permission of the Judge for equal privileges.

Q. And did he grant that permission?

A. Yes, sir. I asked for either an order of the Court that those pictures not be used by the news media or that I be given equal opportunity and left it to the discretion of the Court.

Q. And he granted you permission to take the pictures?

A. He granted me permission to take the same pictures.

Q. And you did that?

A. Yes, sir.

Examination.

By Mr. McGowen:

Q. Did you take them from the same place that Mr. Kaufman took them?

A. As nearly as I could, yes, sir.

Q. From the Judge's Bench, jury box and witness stand?

A. Yes, sir.

Mr. McGowen: Thank you. No further questions.

[fol. 1030] MIKE SHAPIRO, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Your name is Mike Shapiro?

A. Yes, sir.

Q. You live in Dallas, Texas?

A. Yes, sir.

Q. How long have you lived there, Mr. Shapiro?

A. About four years.

Q. What do you do in Dallas, Mr. Shapiro?

A. I am General Manager of WFAA Radio and Television.

Q. You are general manager of the entire facility of radio and television?

A. That is correct.

Q. At the September hearing of this case, Mr. Shapiro, the evidence shows that WFAA had considerable equipment here in the form of a mobile unit and three cameras: you, of course, were familiar with that operation?

A. Yes, sir.

And in that connection, Your Honor, I wonder if it might not shorten the proceedings here, if the Court will give [fol. 1031] us permission to offer the transcript of the proceedings on September 24th and 25th, concerning this trial?

The Court: Just offer the tapes, you mean?

Mr. Hume Cofer: No—well, I do want that in a minute, but offer the Court Reporter's transcript of the proceedings on that occasion so that that evidence will be back in. The Court will remember that on that occasion, we had present the Operations Manager from WFAA-TV and a couple of other people, and we would like to offer that same testimony again on this renewal of our Motion.

The Court: The only thing the facts then are not the same as the facts here now.

Mr. McGowen: Your Honor, we have an entirely different situation now.

The Court: A different situation from what that record shows.

[fol. 1032]

OFFERS IN EVIDENCE

Mr. Hume Cofer: I think the record should show that, Your Honor, and the way I offer it, I offer that as a transcript of the proceedings on that date, so that it will show what the testimony was on that date, and what the situation was on that date. I don't mean to suggest that the facts as testified to then is applicable now.

The Court: You are not offering it as the situation of today?

Mr. Hume Cofer: That is correct.

The Court: All right. You may offer it as the situation of September 24th and 25th.

Mr. Hume Cofer: That has been transcribed and we do offer it and will make it available to the Court.

Reporter's Note: This original transcript or Statement of Facts of the proceedings had on September 24th and 25th is being attached and made a part of this Statement of Facts.

[fol. 1033] Mr. Hume Cofer:

Q. Now, I believe it is, true, Mr. Shapiro, that the mobile unit and your live television cameras have not been brought back here to the court room?

A. That is correct.

Q. What facilities here in the court room are available to WFAA-TV?

A. One camera positioned in the camera booth built for this trial that belongs to ABC and we have been delegated by the ABC Television network to cover for them and that is the camera we will use for our own use.

Q. Is that your camera or is that ABC's camera?

A. It is our camera.

Q. So that you are really performing this function for ABC?

A. That is correct, and for ourselves.

Q. And for yourselves?

A. Yes, sir.

Q. And the product of that work will be available to all of the stations of the ABC network?

A. That is correct.

Q. And that camera, as Mr. Pengra has said, has sound [fol. 1034] equipment with it?

A. That is right.

Q. Have you been served with a subpoena in this case?

A. I have.

Q. Did that subpoena call upon you to bring with you certain video tape which were from the preceding hearings in this court in September?

A. That is correct.

Q. Do you have that tape with you?

A. I do.

Q. Where is it—over there in that chair?

A. In that chair.

Mr. McGowen: The State is going to object to the introduction of any film until we see it and make sure it is all of it.

The Court: Overrule. You can interrogate him and find out on that.

Mr. Hume Cofer:

Q. Tell us what you have—what video tape you have, Mr. Shapiro.

A. The video tape represented here is the unedited [fol. 1035] version of what we televised on September 24th and September 25th.

Q. What do you have—three boxes?

A. Three rolls of video tape.

Q. Three rolls of video tape. Now, this video tape is not a transparent tape that shows pictures by light process?

A. No. It is a special video tape and you have to have a tape machine to look at it.

Q. And that tape machine takes electronic or magnetic impulses off the tape and makes it into a picture; is that correct?

A. Yes, sir.

Q. And this is video tape which can only be shown with that special machine?

A. That is correct.

Q. It is your sworn testimony that those three reels that you have there are the product of what your cameras did in the court room on September 24th and 25th?

A. That is correct.

Q. And it has not been edited. These rolls have not been edited?

A. They have not been, no, sir.

[fol. 1036] Q. Now, you did edit it and make another copy with certain omissions, did you not?

A. That is correct.

Q. Was that tape, edited in this fashion—the one which was transmitted on Monday evening, September 24th?

A. That is correct.

Q. You have that tape but you have not brought it with you?

A. Right.

Q. State whether or not on that occasion, substantially all of the proceedings were transmitted—were the omissions trivial or substantial?

A. The omissions were the lapses in the trial, calling the witness' names, and we had some technical trouble at the beginning of the trial.

Q. Relatively insignificant omissions?

A. Correct. The tape run on Monday night the 24th were the high lights of the trial.

Q. And it lasted how long, do you remember?

A. I jotted some notes down; in fact, I have a log here which I cannot give you. They belong to the station FCC, as well as the tape, but the figures I have, Mr. Cofer, on [fol. 1037] the 24th day of September, we began our live coverage at 9:55 A. M. and we returned to regular program at 11:50 A. M. We came back for live coverage at 1:30 P. M., back to our regular program three minutes later, 1:33. We came back to live coverage at 3:00 o'clock that afternoon, Monday, the 24th, returned to our regular program eighteen minutes later, 3:18. That was the total amount of time live televised by our station and also by KLTV. The video tape ran from 10:43 P. M. that night to 12:21 P. M.

Q. On that night, September 24th?

A. That is right. Total time for the trial, live, on September 24th, two hours and sixteen minutes; total time for the night time program was one hour and thirty-eight minutes; so actually, we covered on Monday, September 24, a total of three hours and fifty-four minutes devoted to the trial, either live or video tape.

Q. That has been run once since then by the station, the Tyler station, has it not?

A. Which?

[fol. 1038] Q. One of those tapes, either the edited or completed edition?

A. They carried it the same time we did.

Q. I understand that; they carried it live that day and that evening?

A. Yes.

Q. And then once a couple of weeks ago?

A. I have no knowledge of that whatsoever.

Q. You mentioned that your log of your time, which I want to talk about some more, and the tape in your custody and must be kept in your custody under FCC rules—

A. Yes, sir.

Mr. Hume Cofer: Your Honor, we request that the Court Reporter mark these three boxes and these three spools.

Mr. Shapiro can't give them, not permitted to and we ask whether it cannot be agreed and understood that we may mark them, identify them, and leave them in his custody. Mr. Shapiro, if we do that, will you keep them safely at WFAA-TV and keep them available for the uses of the State and the Defendant in any connection that is appropriate [fol. 1039] in connection with this proceeding?

A. Yes, sir; but I will state at this point that we want to show no partiality. It is available to the Court.

By Mr. Hume Cofer:

Q. To the Court or to either party to this proceeding?

A. Correct.

Mr. Cofer: And we do make that request. In other words, we think the Court ought not to require Mr. Shapiro to leave them.

The Court: All right.

Mr. Hume Cofer: We do offer Defendant's Exhibits 2, 3 and 4 on this Motion.

Reporter's Note: These tapes and spools identified as Defendant's Exhibits 2, 3 and 4, but not released to the Reporter.

Mr. McGowan: The State would like to ask Mr. Shapiro one question in regard to these exhibits.

[fol. 1040] Q. This is the total film that you have with respect to the proceedings?

A. Yes, sir. This covers everything for the two days, September 24th and 25th.

Q. And only portions of that were actually televised?

A. Right.

Q. All that is here was not televised; is that correct?

A. Yes, sir. Everything here was televised. We taped it while we were televising it live, so it was unedited and everything went on the air for those two days.

Examination.

By Mr. Hume Cofer:

Q. This is what went on the air during those two days, as taped as it was going on the air?

A. Yes, sir.

Q. The only editing that was done was before you replayed it on the evening of the 24th?

A. Correct.

Q. Did you play any more back on the evening of the 25th?

A. No, sir.

Q. So that on the 25th, the only transmission was the [fol. 1041] live transmission?

A. We did have news coverage on the 25th, but it appeared in our regular news cast, no special program.

Q. Did your news coverage have spots from this tape?

A. From the Tuesday tape, yes, sir.

Q. Beginning on Monday morning, at the beginning of and during and at the end of the live transmission from the court room, what commercials did WFAA put on the air with the tape?

A. Mr. Cofer, at the outset, I would like to repeat what Mr. Pengra testified to a minute ago. These are commercials that were sold our stations between and participating in the regular programs; so there was no attempt to go out and sell commercials for this. These are regular commercials appearing in our regular program.

Q. In other words, it is your testimony that you did not say to any customer "I have a particularly good spot for you in connection with the Estes proceedings"?

A. To be quite honest with you, I don't think they know [fol. 1042] today they were in the trial, that the commercials were in the trial.

Q. But you did play and transmit at the time of the proceedings those commercials which you are about to tell us of?

A. That is correct. And that was when they were in recess, at an appropriate time within the actual trial pro-

ceedings itself. We went on the air at 9:55; at 10:30 A. M. we ran a one-minute commercial for Sprite.

Q. For whom?

A. Sprite.

Q. That is a soft drink, I believe?

A. That's right.

Q. Is it a singing commercial?

A. I don't know.

Q. Aren't most of the Sprite ads singing commercials?

A. They may be.

Q. You know considerable about your sales, don't you, Mike?

A. You want to keep on this one or go to the next one?

Q. I want to know what you know about the Sprite [fol. 1043] commercial, and if you don't know that is all right.

A. I am sure there is some music in the commercial. The next commercial was run at 11:42 for Shedd Bartusch. The next commercial which was run for a minute was at 11:43 for Campbell's soup.

Q. Any others during the morning's proceedings?

A. No other from 9:55 to 11:50 and none between 1:30 and 1:33; and none between 3:00 and 3:18.

Q. Now, during those times, how many station breaks would you estimate you had, or can you tell from your log?

A. I can tell from the log.

Q. Tell us how many station breaks during that entire time.

A. There was a station break at 11:42 to identify the station.

Q. Is that the first one since 9:50?

A. Yes, sir. There was another one—

Q. Wait a minute. Did you go from 9:50 to 11:42 without a station break?

A. From 9:50—that is correct.

Q. Didn't you have a station break in connection with [fol. 1044] those two or three commercials that you mentioned?

A. This is where the station breaks appear. I just gave you the time period next to the Shedd Bartusch Market.

Q. And there was not one before that?

A. No, sir. The next one came at 11:42, next one Campbell's soup commercial; next one came at—that was all during the trial, those two.

Q. And one just before the beginning of the trial proceedings and one at the end of the trial proceedings?

A. Yes, sir.

Q. When you take the station breaks like that, does your affiliate station ordinarily show its own station identification and a short commercial of its own?

A. In some cases, but we did not on this day. Purely identifying the stations and no commercial messages adjoining it.

Q. Did the commercials which you have mentioned go out over the wire to Tyler?

A. I don't know. I couldn't answer that.

Q. You don't know whether Tyler played your commercial [fol. 1045] or its own?

A. I have no knowledge of that.

Q. Now, if you will, tell us about the commercials at the beginning of, during and at the end of the program on Monday evening, September 24th.

A. We had a station identification at 10:42 P. M. that night, Monday, the 24th.

Q. What time did the program start?

A. Started on the air at 10:43. We identified the station just prior to the beginning of the tape.

Q. And there was, was there not, a commercial just prior to the beginning of the station break?

A. Yes, there was.

Q. Do you know what it was?

A. Yes, I do.

Q. What was it?

A. There were two commercials, one for Simonize and one for Been Eye Drops.

Q. But the Simonize and Been's Eye Drops preceded the station break which preceded the handling of the trial?

A. Yes, sir. I would like to say at this point, Mr. Cofer: you are trying to read this log into the trial itself, when [fol. 1046] these commercials are scheduled every night in that sequence. The fact that they happened to be adjacent

to the trial, I don't think should be a part of the commercials listed for the trial.

Q. I understand that they are not on the same tape, but I do want to ask you, and I don't think you have any objections, what came immediately before the play and during and immediately after that evening.

A. I have already given you the announcement preceding the beginning of the tape at 10:43.

Q. Then what is next?

A. The first commercial that was run inside of the tape came at 10:48, Icecapades, and at 10:49 a commercial for Rayco seat covers.

Q. Now that Icecapades and that Rayco seat covers they were played one after the other without any court proceedings between; is that correct?

A. That is correct, in order not to interfere with any trial tape activity. In other words, it was placed in the tape in the same manner that we would place it in a movie or anything else.

Q. And, as a matter of fact, the court proceedings that evening were substituted on your station for your late [fol. 1047] show, were they not?

A. Correct.

Q. For the late movie?

A. That is correct, and the commercials that you are hearing about now would have normally gone in that late program.

Q. You just played the same commercials that had been scheduled for the late movie at the same places during the transmission of this program?

A. That is correct. We had a total of six breaks in the tape.

Q. Six breaks in the tape, not counting the ones we talked about just before or after the end?

A. That is correct.

Q. And at the first break that you have just told us about, you had Icecapades and Simonize?

A. Icecapades and Rayco seat covers.

Q. How long did each of those commercials last?

A. A minute.

Q. A minute for each?

A. Yes, sir.

Q. What was your next break?

A. The next one came at 11:13, minute announcement for Home Furniture and a minute announcement for [fol. 1048] Interstate Theater.

Q. Just those two, one minute commercials?

A. That is correct. The third break came at 11:41 All detergent for a minute, and Griffin polish for twenty seconds.

Q. All right, sir; go ahead.

A. At 11:42 we identified again—this was a tape presentation from the trial; at 11:53 the fourth break came up for Guest Beard for a minute and twenty-second announcement for Murine. The fifth break came at 12:08 for Skyline—and an eight-second announcement for Readers Digest. The last break came at 12:14 for a minute for Dallas Morning News.

Q. Anything besides the Dallas Morning News on that?

A. No; just one on the last one.

Q. During each of those breaks, state whether or not you also identified your station?

A. No, sir. We didn't identify it but once.

Q. You did not have any slides?

A. We had a slide on at 11:42.

Q. That shows the station?

A. That's right.

[fol. 1049] Q. And not again until after the proceedings?

A. That's right.

Q. What did you have on while you were explaining on the occasion of that break, the nature of the program, what did you have on the screen? You mentioned one break there when you told what you were doing.

A. I believe it was a standard station slide; special event, not positive.

Q. Was that the only station slide you showed from the beginning to the end?

A. To the best of my knowledge, yes, sir.

Q. Did your Company obtain the permission of the Defendant to use any pictures, his pictures, and pictures of the trial in connection with this commercial?

A. No, sir.

Q. Do you have any ideas about your listening audience, extent of your listening audience?

A. I believe I have.

Q. What would you say the size of your audience would be—well, first, let's say your Monday morning program, September 24th, do you have an estimate or opinion of it? [fol. 1050] A. To be honest with you, I think the day time coverage of the trial was rather limited.

Q. What is your idea about the number? Do you have any?

A. No, I don't have, off-hand. It could be in the thousands as far as day time audience.

Q. Now, tell me about the night time audience.

A. The night time audience, I feel this broadcast belonged in this court room and that is why we wanted it on at night, to reach a larger audience, and who would not see it during the day, and I would guess that our night time audience, though I have no way of figuring it, I would say that it reached—I think a guess would be probably a hundred thousand.

Q. You think that is in your Dallas area that you are talking about?

A. That is right. The total count for the Dallas-Fort Worth area, which we serve, is around 760,000 sets. That is the maximum.

Q. And you estimate something at or over one hundred thousand for Monday night's program?

A. Yes, sir.

Q. And that does not include, as you have indicated, [fol. 1051] the number of viewers in Smith County?

A. That is correct.

Q. Then Tuesday morning, tell me about your commercials.

A. Tuesday morning we had absolutely no commercials in the trial. Began our live coverage at 9:00 A. M.

Q. What happened immediately before nine A. M., during the five minutes before 9:00 A. M.?

A. Immediately preceding the beginning of the live telecast at 9:00 o'clock, we had a 20-second announcement of TV Guide and an eight-second announcement calling attention to the fact that this was a taped telecast and we had

our station identification on it. This was at nine o'clock. At 9:26, in a lapse of proceedings in the trial, we ran a 40-second announcement calling attention to a program on the air—not a commercial announcement. It was a promotional announcement of a program.

Q. Promotion of the program that your station was going to carry?

A. Going to carry. We also carried station identification at 9:26. We returned to our regular program at 10:00 A. M. [fol. 1052] We came back to the trial at 1:29 P. M. to 1:52 P. M. and there were no commercials in any of the live telecasts on Tuesday.

Q. How about just before and after the proceedings in the afternoon? Two sessions, one earlier and one later in the afternoon.

A. We had a one-minute announcement on at—(Looks at log) We had another TV Guide announcement of twenty seconds; we had a 20-second commercial announcement on our news cast and we had station identification, two seconds.

Q. Did you finish?

A. Yes.

Q. I just wanted you to cover those just before and after the proceedings that afternoon.

A. I have.

Mr. Cofer: Pass the witness.

Examination.

By Mr. McGowen:

Q. Mr. Shapiro, do you regularly testify as a witness in court?

A. This is my first experience and I hope my last.

Q. Let me ask you something. During the time that you [fol. 1053] have been testifying, have you been disturbed by these people at the press table over there or by the cameras behind the screen in the back of the room?

A. I didn't know they were there.

Mr. McGowen: Thank you.

Examination.

By Mr. Hume Cofer:

Q. You didn't know the cameras were back there?

A. Not while I was testifying. I was concentrating on your questions.

Mr. Cofer: Pass the witness.

By the Court:

Q. Do you hear any noise in the court room at this time except the air conditioner blowers here?

A. No, sir.

Mr. Hume Cofer: We have no further questions for Mr. Shapiro.

Examination.

By Mr. McGowen:

Q. With respect to television business, I assume that most of the revenue is derived from commercials, the sale of commercials and advertising?

A. That is what keeps us in business.

[fol. 1054] Q. Would that be the same for newspapers?

A. Correct. If it were not for these commercials, we would not have been able to afford to have come down and covered the trial, in the first place, which I think is in the public interest.

Mr. McGowen: That is all. Thank you, Mr. Shapiro.

Mr. Hume Cofer: Thank you very much.

Recall of MARSHALL PENGRA for further examination.

By Mr. Hume Cofer:

Q. Mr. Pengra, there is one other question I would like to ask you. You are Marshall Pengra?

A. Yes.

Q. On recall to the stand. Tell us about any replays of the Estes proceedings within the last—well, since the end of the proceedings on the 25th of September.

A. Only on the night of the 24th, if I have my dates correctly in mind, which was the only release. That was the Estes tape that WFAA released and we carried it simultaneously as they released it. We have made no other re-[fol. 1055] lease of any type of tape. As a matter of fact, we do not own a tape machine, so we couldn't handle this.

Q. Have you had a film feature concerning the proceedings during the last four weeks?

A. What do you mean by film feature?

Q. Have you had any transmission of pictures over your station—pictures of the Estes trial proceedings since September 25th?

A. Only in the form of news clips that would reference the time of the trial, taking up again and so on, that I recall. Is television on trial here or is this another matter, Mr. Cofer?

Mr. John D. Cofer: Now, Your Honor, we think the witness should be instructed that he is supposed to answer questions and we are not supposed to answer.

The Court: Just answer the questions.

Mr. John D. Cofer: I will state to Your Honor that I think that it is justice that is on trial here and television has nothing to do with this proceedings and ought not to be in here.

[fol. 1056] Mr. Hume Cofer:

Q. Are you familiar with the Television Cable Company that operates in Tyler?

A. I am familiar with it. I know that it operates here.

Q. Do you know how many customers it has?

A. No, I don't.

Q. Do you know approximately?

A. I have heard various figures but I would not attempt to comment on something that I am not fully acquainted with.

Q. Do you have any figures about the extent of your audience? KLTU.

A. We have a potential viewing audience, according to our power and our location, of some 139,000 television homes in approximately twenty-eight county area. This is based on measurement that indicates that there are that many homes who could receive our station—signal within the twenty-eight-county area.

Mr. Cofer: Pass the witness.

Examination.

By Mr. McGowen:

Q. I would like to ask you, Mr. Pengra: during the time [fol. 1057] that you have been answering Mr. Cofer's questions and testifying, have you been disturbed by any activities behind the screen in the rear of the court room?

A. No, sir, I haven't.

Q. Have you been disturbed by the activities of the press at the table, sitting here in the court room?

A. No, I haven't.

Q. Have you been disturbed by the clicking of the cameras or have you heard any clicking?

A. There are no clicking cameras in the court room, to my knowledge. I looked them over pretty carefully today. That was one of the things that was going to disturb. Those are electric cameras; they don't click and they don't grind.

Q. Have you been disturbed by anything while in the court room and while you have been testifying?

A. Principally, the questions by the defense—

Q. Other than what Mr. Cofer has asked you?

A. No, sir.

By the Court:

Q. Mr. Pengra, I notice that you have been sitting over in the jury box. While sitting there, were you facing the [fol. 1058] cameras?

A. No. You have to make a direct turn when you are seated in the jury box and make a specific effort to look at the cameras. During the intensity of a bit of questioning with any witness as inexperienced as I, I can assure you

that just about everything else is closed out of your mind if you are concentrating on the questions that are given you. I felt the same as Mr. Shapiro. I had forgotten all about whether there were cameras here or reporters here. It is a pretty heavy piece of concentration on the questions that are directed at you.

Examination.

By Mr. Hume Cofer:

Q. Mr. Pengra, suppose that you were involved in a business transaction with Billie Sol Estes, and you knew that there were one hundred million people in the United States that know about Billie Sol Estes and that they were going to learn about your business transaction with him: do you think there is any possibility that you might give that some thought?

[fol. 1059] Mr. McGowen: Your Honor, I object to that. It calls for a conclusion of the witness and besides that, it poses a hypothetical situation and calls for expert testimony.

The Court: I am going to sustain the objection. I think you are getting into the realm of speculation now.

Mr. Hume Cofer: Note our exceptions. We think it is proper in connection with the witness' speculation about his reaction to this trial. Of course, this witness doesn't have any connection with Mr. Estes—and couldn't have any pre-occupation—

The Court: He has testified as to his knowledge as a witness, and we don't want to get into the realm of speculation.

Mr. John D. Cofer: Your Honor, we would like to call the attention of the Court, and ask the Court to entertain the proposition that the attitude of this witness is such that we are complaining of as to the publicity of this case. That [fol. 1060] this witness testifying has shown a particular desire to take issue with the Defendant's efforts in this court room to obtain a fair trial; and we say that the attitude of this man who doesn't know the Defendant, but has learned about him largely through what he is saying on his own television set and through news media demon-

strates his ability of the general and bias in this community to give the Defendant at this time a fair trial. We are going to bring that up later in a subsequent Motion, after Your Honor has ruled upon this matter, but we think it is proper that the Court should take particular notice that this witness is prone to be incensed—the idea that Defendant should question his right to commercialize the unfortunate circumstances under which he is being subjected to in this court.

The Court: Mr. Cofer, of course, I can't govern people's attitudes and I feel like this gentleman here is trying to protect his rights for news; and he has not shown prejudice, and I can't go with you on that. Overrule.

[fol. 1061] Mr. John D. Cofer: The thing that I was objecting to, Your Honor, is the fact that this witness has stated the only annoyance that he had in this room was being questioned by the Defendant's lawyer. Now, I resent that. Why shouldn't this man be willing to be questioned by the Defendant's lawyer, as well as by the State lawyer?

The Court: He has been questioned by you.

Mr. John D. Cofer: I objected to him expressing his resentment, Your Honor.

Mr. McGowen: Your Honor, I believe Mr. Cofer would like to have the record read back. I don't believe that is what the witness said.

Mr. John D. Cofer: I might have misunderstood him and I don't care to have it read again, but as I understood this witness when he said "Is television on trial here". We are certainly trying to present something that we very strongly believe in, that television shouldn't be a part of [fol. 1062] this trial; and evidently he feels that this trial ought to be held, together with Defendant convicted and let him take pictures of it while it is going on.

Mr. Pengra: May I answer that, Judge? Am I entitled to answer that?

The Court: Yes, you may state your feelings since he has charged you with that. You may state your feelings to the Court. Go right ahead.

Mr. Pengra: Mr. Cofer, I think that you—

Mr. John D. Cofer: Your Honor, I object to this witness addressing me. He can address the Court but I have nothing to say to him.

The Court: Address the Court, Mr. Pengra.

Mr. Pengra: Your Honor, I think Mr. Cofer is attempting to read into my answer some animosity towards his client in a tendency to identify me with what he believes the general public believes about his client. I would like to [fol. 1063] have it very completely understood that the line of questioning that the Defendant has developed as far as television coverage of this trial is concerned, concerns me primarily as a news media that should have the right of any other news media to cover an important feature of the news, which, in this case, is this trial. If the actual proceedings that take place here can properly be presented by the newspapers and their reporting, certainly there can be no question as to the very accuracy of the camera and the recorded sound where permitted to bring the public this same information.

My principal feeling of resentment has not anything to do with the client in this particular case, the Defendant himself, but with what seems to be a rather obvious attack on the rights of a mature news media, the television industry. I hope I am clear on that, sir.

Mr. Hume Cofer: We have no further questions.

Mr. McGowen: No further questions.

[fol. 1064]

Recall of FERD KAUFMAN for Further Examination.

By Mr. Hume Cofer:

Q. You are Ferd Kaufman?

A. Yes, sir.

Q. You attended the September proceedings in this case, did you not?

A. Yes, sir.

Q. Tell me whether or not this photograph marked Defendant's Exhibit 5 is one of the pictures which you took at the September proceedings.

A. Yes, sir.

OFFER IN EVIDENCE

Mr. Hume Cofer: We offer this exhibit, "D-5", and that is all. (Photograph forwarded as original exhibit).

Examination.

By Mr. McGowen:

Q. I assume that this picture would represent Mr. Dennison, Mr. Cofer and Mr. Estes—seem to be discoursing there. Did you take many, many pictures?

A. Yes, sir.

Q. You didn't just limit the pictures to taking for Mr. Dennison and Mr. Cofer and Mr. Estes, those four?

A. No: I think there were pictures of, we will say, [fol. 1065] everything that moved.

Q. I would like to ask you, does that picture as introduced by the Defendant, does that accurately represent the conditions in the court room at the time it was taken?

A. Yes, as I recollect, this was made during a recess and the gentlemen were there at the table, and I doubt seriously if they were aware that the picture was made until it was published.

Q. Were those the same conditions as depicted here by this picture are not present today, are they?

A. No, sir. You see no live television as depicted in this picture.

Examination.

By Mr. Hume Cofer:

Q. The live television to which you referred to is the large camera on the left edge of the picture?

A. That's right.

Mr. Cofer: No further questions.

Your Honor, we do request the opportunity to have a couple of pictures taken of the structure that we have already mentioned, and we have a man here for that purpose. [fol. 1066] The Court: Don't count that camera against me that you are going to bring in. That will be your

camera. I understood he wanted to come in and take some pictures and I don't want to be charged with that camera.

There is no objection to bringing it in, Mr. Cofer. The only thing I want to make clear is that if you are going to bring a camera in here, I don't want it counted as something I have brought in here; and I want it understood that the Defendant is bringing it in. I am not questioning his being an expert and his integrity, but I just want to get it straight where the camera belongs. Not something I have brought in here. I want it understood that the Defendant is bringing it in here.

Mr. John D. Cofer: We want to take a picture of the court room for the purpose of our testimony of the situation as it is.

Mr. Hume Cofer: This gentleman, Your Honor, is not a press photographer and he has asked permission to use [fol. 1067] a flash for these two or three pictures that he is making.

The Court: With the understanding that there is no objection on Defendant's part.

Mr. Hume Cofer: We requested it, Your Honor. He doesn't have the press equipment.

The Court: With that understanding, it will be all right; that the Defendant agrees to that.

OTIS T. DUNAGAN, JR., being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. Ed Dunagan.

Q. Where do you live, Mr. Dunagan?

A. Austin.

Q. And what is your place of business there?

A. KNOW radio.

Q. In—with offices there in the capital building in [fol. 1068] Austin?

A. Correct.

Q. How long have you been with KNOW?

A. About two years.

Q. What facilities are here in Tyler in and around and next to the court room, which are available to KNOW?

A. Basically the same thing we had last month which consists of a: amplifier, telephone, tape recorder and a microphone.

Q. Are you broadcasting the proceedings over the radio?

A. Not live.

Q. What do you do? Do you have regular hourly announcements or periodic announcements?

A. No, we do not.

Q. Are you taping the proceedings?

A. We have been taping so far this morning, mainly as a means to monitor what occurs in the court room and not as a play-back.

Q. Is it available for play-back if any of the stations in your chain wish to play it back?

A. I believe probably now, not.

Q. Tell me whether—it is true, is it not, there are six [fol. 1069] stations in the network that your station is a member of?

A. You are referring to the Wendell-Mays Stations?

Q. Yes, I am.

A. There are seven.

Q. Are the proceedings being broadcast by any radio station or company?

A. Not to my knowledge.

Q. Is there another facility in there that you know about, or should we ask him about that?

A. There is another facility in there and perhaps you had better ask him about it. I can say that he is not broadcasting live.

Q. Have you made or do you plan to make any announcement from the room next to the court room concerning this trial?

A. Yes, we do.

Q. What is the nature of those?

A. They are, basically, one minute reports to be made as we feel events occur that are worth reporting.

Q. And your equipment is located in the room between—that it occupied at the September proceedings? That is in [fol. 1070] the room between the hall and the jury box? End of the jury box.

A. That is correct.

Mr. Hume Cofer: I believe that is all.

By the Court:

Q. Let me ask you. You don't operate in the court room at all?

A. We do not.

Mr. Hume Cofer:

Q. What microphones are available for the use of your equipment?

A. The two court room microphones, the one here on the witness stand and the one on the Judge's Bench.

Mr. Hume Cofer: That is all.

Mr. McGowan: We have no questions.

CHUCK FOSTER, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

[fol. 1071] Q. State your name, please, sir.

A. Chuck Foster.

Q. Where do you work?

A. KTBB, radio station.

Q. What place?

A. In Tyler.

Q. Does KTBB have any radio equipment in the room next to the court room?

A. Yes, we do have.

Q. What equipment is that?

A. We have an amplifier, sound amplifier and microphone.

Q. What is the purpose of that equipment and what is it being used for now?

A. At this moment, it is feeding the trial to our studio where it is being taped.

Q. It is being taped at the studio?

A. Yes.

Q. It is not being broadcast?

A. No, sir.

Q. Will it be available there for a broadcast at a later date?

A. I assume it will be available but it is not meant to be used that way.

[fol. 1072] Mr. Hume Cofer: I believe that's all.

Q. Oh, you are using the same microphones that the other facility is using, the court room microphone?

A. The court room microphones.

Mr. Cofer: That's all.

Examination.

By Mr. McGowen:

Q. I would like to ask you, have you been, in any way disturbed by the activities of the press people at the table or the cameras behind the screen at the rear of the court room?

A. No, sir, I have not.

Q. Were you even aware that they were here while answering Mr. Cofer's questions?

A. Not at the moment I was answering the questions.

Mr. McGowen: No further questions.

OFFER IN EVIDENCE

Mr. Hume Cofer: Your Honor, may we offer now the photographs which Mr. Faulkner has taken, even though [fol. 1073] they are not ready?

The Court: All right.

[fol. 1075] Mr. McGowen: I don't know who is in charge of the cameras there. I would like to put Mr. Dennison on the stand here and see if he can tell when they are on and when they are off.

JOHN DENNISON, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. McGowen:

Q. Mr. Dennison, if you will just face this other direction, I am particularly interested with respect to noise. If you will face that way (indicating). We will cut all of them off and then signal to turn them on and see if you can tell any difference; if so, will you signify to us that you can hear them in operation. Are they all off? Just tell us, Mr. Dennison, any time you hear a change, when they go on.

A. I can hear something but I am not familiar with the noise.

Q. Do you hear any noise now, Mr. Dennison? Do you hear any more noise now than you did when you first faced the wall?

[fol. 1076] A. Not that I can identify.

Mr. McGowen: Thank you, Mr. Dennison.

Mr. Hume Cofer: May it be stipulated they were not all running?

Mr. McGowen: Well, I would like for Mr. Dennison to come back then and have them all running.

Recall of JOHN DENNISON for Further Examination.

By Mr. McGowen:

Q. Mr. Dennison come back and face the wall, please. Now, tell me, Mr. Dennison, any time that you hear a perceptible change in the noise.

A. I hear something but I don't know what it is.

Q. Do you hear any more now than you did when you first went there, Mr. Dennison, and faced the wall? Do you hear any distraction?

A. I can hear something but I cannot identify it.

Q. Does it distract you?

A. Well, I think it would distract the witness.

Q. But not yourself?

A. No, sir.

[fol. 1077] The Court: Is that all for the State on the Motion?

Mr. McGowen: Yes, sir.

The Court: All right, Mr. Cofer.

RENEWAL OF MOTION TO BAN CAMERAS, ETC. AND COURTS' RULING THEREON

Mr. Hume Cofer: Your Honor, we state again the grounds on which we renew our Motion.

That Defendant moves and asks the Court to take and require that all cameras, still and television and news reels and movie cameras be instructed to remain out of the court room. The Defendant takes the position that the presence of the cameras interferes with his rights to a fair trial, constitutes an imposition on due process with respect to the Defendant, impedes the activities of his attorneys in consulting with him and conducting the trial of the case; distracts jurors, leads the jurors to be constantly aware of the publicity attached to the case, and is calculated and likely to distract the witnesses to the extent that the witnesses' testimony may be inaccurate or conceivably untruthful, and we [fol. 1078] do move that all cameras be removed for those reasons.

Mr. McGowen: Your Honor, of course, this is within Your Honor's discretionary powers and our efforts have been to develop the full facts and not with respect to—not necessarily what the State desires, and the State would not want the trial to be interfered with in any way. Our cross examination is to bring out the complete facts and this is a matter within Your Honor's discretionary power.

The Court: First, there are six microphones in the court room and four of them belong to the Court. Smith County

jurors are used to microphones and I don't think it would excite them one bit. They see them in my court room; they see them in Judge McKay's court room and they see them in Judge Loftis' court room and I don't think you need have any fear of upsetting jurors in this case at all.

As I said before, out of the six four belong to the Court. This matter can't be passed on as far as the Court is concerned [fol. 1079] from the matter of emotion or tradition. The Court must look at this matter from a legal standpoint. This case is not being tried under the American Bar rules. I do not say that critically of the American Bar rules. That is their privilege, to have their rules and they may be good rules; but Texas has never adopted those rules or has seen fit to. This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution.

Now, the Bill of Rights, Section 10, which is a part of the Constitution of Texas, provides that every Defendant in a criminal case is guaranteed—doesn't say may—is guaranteed a public trial, and that is what I am trying to do. There are some cases under that section and the Court of Criminal Appeals, where, in one case, where the Judge issued orders that there not be anything printed about that case. The newspaper reporter reported it any way. He was cited for contempt by the Court and ordered to jail and [fol. 1080] appealed to the Court of Criminal Appeals. And the Court said this:

"Our Constitution is but in accord with the genius and spirit of our free institutions, which is intended to guaranty publicity to the proceedings of our courts, and the greatest freedom in the discussion of the doings of such tribunals, consistent with truth and decency. And as has been well said, 'When it is claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the lawmaking power'. And this imposition must be in accord with the provisions of our constitution guarantying the publicity of all trials, as well as the freedom of speech and of the press".

And the Court goes on further and says: "And even if there was a conflict here between the authority and dignity of the court, that should yield to the plain letter of the constitution."

I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution; and I am going [fol. 1081] to do my best to do that as long as I preside on this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful. I have learned through my twenty years on the Bench that you can't satisfy all of the lawyers with your rulings and I don't attempt to. I try to satisfy myself and my conscience and I have done that in this matter. Now, a later case than that is Ex Parte Davis case written by the Court of Criminal Appeals in January of this year, and that is where the Judge had a run-in with one of the reporters and as such, he ordered this particular reporter to stay outside the Bar and the rest could come in and sit down and report the news. And the Court of Criminal Appeals said this:

"We do not deny the trial court the right to punish for contempt a reporter for conduct in the presence of the court which interferes with orderly proceedings in the administration of justice. We also recognize his authority to enter an order excluding all newspaper reporters and all other reporters"—and all other reporters would have to be TV [fol. 1082] and radio—"from inside the rail the rail of his courtroom and reserve that particular area solely for the attorneys, litigants and witnesses and court officials. We do not think, however, that a trial judge has the authority to exclude one particular individual from coming inside the rail of his courtroom and continue to allow other individuals similarly situated to come within the area encompassed by the rail."

Now, to me, the Court says if one goes, they all go; if TV and radio go, the press would have to go, and that means then that this case instead of a public has become a private trial which is in violation of the constitution, and I hope the day never comes when this country is shut off from the news.

I have no fear of people knowing what goes on in this court room. Now, on the other trial, the prospective jurors and others in Smith county or any other place did not learn any more than they already knew, and they didn't learn any more from TV and radio than they learned from the press, and that was that the Defendant had been brought here for [fol. 1083] trial and the case called. That the Defendant had filed a motion to exclude cameras; that he had filed a motion for a continuance; that the witnesses' names were called and a number found missing. That is all they learned. They learned that from the press; they didn't learn anything additional from TV or radio, and I have not yet been able to figure out how we could seat twelve jurors over here to try this case that wouldn't have learned he was under indictment and is here for trial, and that is all they have learned so far.

So with that feeling, I am overruling your Motion.

Mr. John D. Cofer: To which we except in overruling.

Mr. Maloney: Your Honor, the AP and UPI took pictures and were placed on the stand, and those pictures are being made available to the Court; and we hereby offer all of those having been testified to as the positions from where taken into the record.

[fol. 1084] We further request the Court that the photographers who took the pictures outside of the Bar before those pictures are admitted as a part of this record be put on the stand and testify from where he took the pictures, and we will object to those pictures until that particular photographer testifies from where he took them.

* * * * *

[fol. 1085] The Court: Now, Gentlemen, we will get around to what we came here for. I am calling the case, State of Texas versus Billie Sol Estes, No. 16,818. What says the State in that case?

* * * * *

[fol. 1086] The Court: Suppose we take that up this afternoon.

Now, Gentlemen, I want to remind you again of the Court's ruling on the taking of pictures behind this Bar during recess or any other time.

[fol. 1087] The Court: Except your personal lawyers and Mr. Tomlin. Outside, no one else except the lawyers in this case.

Now, also, after this case gets under way and testimony is being offered on the merits of this case, do not read—I will say from now on I will give you these instructions. These instructions are as of now. Do not read reports or listen to comments concerning this case. You understand, of course, that these are the instructions of the Court and any violation of them you will be in contempt of court—a contempt action contrary to the Court's instructions.

Let me ask you, gentlemen, attorneys in this case: I don't know how long it will be before we will need these witnesses.

[fol. 1090] Mr. Hume Cofer: We renew now, Your Honor, our Motion to exclude all cameras and sound equipment from the court room and state as an additional ground of our Motion that the presence of the cameras and sound equipment in the court room will probably result in a violation of the rule with respect to disclosure to the witnesses of the proceedings in the court room.

Mr. John D. Cofer: Also, Your Honor, permitting cameras in the court room violates the Defendant's right not only under the constitution of Texas but under the constitution of the United States and the amendments thereto, and we now urge this as denying him due process of law under the State constitution and the Federal constitution.

The Court: I suspected for that reason I said I wanted it understood that I don't hold that the rule is being violated until the witness starts testifying. That is the reason I wanted that in the record for I suspected what was coming.

Overrule your Motion.

Mr. John D. Cofer: We except, Your Honor.

[fol. 1093]

OFFERS IN EVIDENCE

Mr. Hume Cofer: Your Honor, the instrument the Reporter is now marking is D-1 and we will substitute that for the original thermofax D-1 heretofore introduced in evidence.

Mr. Holcomb: No objections by the State.

"In my statement of September 24, 1962, admitting television and other cameras in the court room during the trial of Billie Sol Estes, I said cameras would be allowed under the control and direction of the Court so [fol. 1094] long as they did not violate the legal rights of the Defendant or the State of Texas. Television and radio, being means of presenting the news, should be given equal treatment with other news media insofar as the law governing trial procedure permits.

I believe it would be the rankest kind of discrimination between the news media to refuse these two sources of reporting the news equal access to news coming from the trial of lawsuits in the court room insofar as it can be done in keeping with proper court procedure.

In line with my statement of September 24, 1962, I am at this time informing both television and radio that live broadcasting or telecasting by either news media cannot and will not be permitted during the interrogation of jurors in testing their qualifications, or of the testimony given by the witnesses, as to do so would be in violation of Art. 644 of the Code of Criminal Procedure of Texas, which provides as follows:

"At the request of either party, the witnesses on both [fol. 1095] sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under rule."

If the Judicial Section of the State Bar of Texas, meeting in Austin on October 5th and 6th, does not adopt Rule 35 of the Canon of Ethics of the American Bar Association and continues to permit each Judge to conduct his court and control his court room as he

deems right and proper, as long as the law is complied with, in that event each television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis. Marshall Pengra, manager of Television Station KLTU, Tyler, will be in charge of the independent pool and independent stations may contact him. The same will be true of cameras for the press, which will be limited to the local press, Associated Press and [fol. 1096] United Press.

The Estes case was called for trial in Tyler on September 24th, and was not the first in Texas where television and other cameras were permitted. There have been several cases in my court in which television and other cameras have been permitted in the court room. Almost every night on television news programs, I see pictures of court room proceedings that were filmed in the court rooms. This practice has been going on for several years in my court, and other courts throughout this State.

The Estes case is not the first in which live television from the court room has been permitted. To my knowledge, there have been two others, the first one several years ago from Waco, a murder trial, I believe. However, trials heretofore telecast live from Texas court rooms were permitted by consent of both prosecution and defense legal counsel, and, therefore, any objection to a violation of Article 644 in this respect was waived. Since that time, neither the State Bar of Texas nor the Judicial Section of the State Bar have condemned such practice.

[fol. 1097] I am making this statement at this time in order that the two news media affected may have sufficient notice before the case is called on October 22nd.

The rules I have set forth above concerning the use of cameras are subject to change if I find that they are too restrictive or not workable, for any reason.

At the beginning of the Estes trial in this court, I stated that I had not invited either television, radio or the press to be here, but that they were here. However,

one news wire service in its report carried in newspapers all over the nation quoted me as having said that I had invited television, radio and press to be here. I am taking this opportunity to correct that error and requesting that wire service to make the necessary explanation for their mistake."

4:15 P. M.

The Court: Do you want to offer your pictures now?

Mr. McGowen: Yes, Your Honor. We have agreed with [fol. 1098] Defense counsel:

State's Exhibit #1 represents a picture taken from the jury box towards the rear of the court room. State's Exhibit #2 represents a photograph taken from the witness stand towards the rear of the court room. State's Exhibit #3 represents a photograph taken from behind the Judge's Bench towards the rear of the court room. State's Exhibit #4 represents a photograph taken from the witness stand towards the rear of the court room. State's Exhibit #5 represents a photograph taken from behind the Judge's Bench towards the rear of the court room. State's Exhibit #6 represents a photograph from behind the jury box towards the rear of the court room.

We would like to offer those in evidence as previously stated for the purpose of showing the conditions here on October 22, 1962.

Reporter's Note: State's Exhibits 1 through 6 being photographs as above set out are being forwarded as original exhibits.

The Court: Are those the conditions as of this date? [fol. 1099] Mr. McGowen: Yes, sir.

[fol. 1101] Mr. Hume-Cofer: Now, Your Honor, with respect to Defendant's Exhibits 7, 8, 9 and 11 through 21, we say that those are photographs taken of the court room and the court house and the surrounding area on September 24, 1962, and they are offered in support of and in connection with the present Motion for Continuance to show the extent of the activities of the news media in and around the court house on that occasion, and we do offer those and do

state and specify that they show the situation on September 24, 1962.

Mr. Maloney: They don't portray the facts on that date?

Mr. Hume Cofer: They were taken on September 24th.

[fol. 1102] Reporter's Note: Defendant's Exhibits 7, 8, 9, and 11 through 21 are photographs which will be forwarded as original exhibits with this Statement of Facts.

Mr. Hume Cofer: Then we offer the newspapers which have been marked Defendant's Exhibits 22, 23 and 24, which are the newspapers of Tyler and Dallas, on September 24th and 25th, I believe.

Reporter's Note: Defendant's Exhibits 22, 23 and 24, newspapers as identified are being forwarded with the other original exhibits in this case.

Mr. Hume Cofer: Defendant offers Defendant's Exhibit 25, which is a volume of clippings from the period of August 30th through September 24th, 1962, clippings in Texas newspapers. We offer that in support of the Motion. These are all just within three weeks of the last setting in this court, up to the date of the last setting.

Reporter's Note: Defendant's Exhibit 25, volume of clippings, is being forwarded as an original exhibit along with other original exhibits in this case.

[fol. 1103] Mr. Hume Cofer: Now, the Defendant offers all of the proceedings this morning in the hearing on the Motion to exclude cameras from the court room, all of the proceedings, exhibits and testimony which the Defendant offered this morning, the Defendant asks leave to include in this record on the Motion for Continuance; that is, the testimony this morning concerning the extent of the camera coverage of the present proceedings.

Reporter's Note: All of the previous pages of this transcript incorporate the above offer.

The Court: I believe I will let you put this back over there, Mr. Cofer.

Mr. Hume Cofer: Yes, sir. That makes thirteen big volumes and a small partial volume—small unbound volume in a box of clippings, that we have in this record altogether.

Mr. John D. Cofer: Your Honor, I was trying a case and would like to offer this with the statement that I would like [fol. 1104] to offer and will be glad to swear to it—in John-

son City and a gentlemen, whom I did not know, handed that to me.

The Court: In Johnson City?

Mr. John D. Cofer: Yes, sir, and he had a whole hand full in his pocket.

The Court: Let me see what they have down in Johnson City.

Mr. John D. Cofer: It is stipulated that I have never seen this card except in Johnson City.

The Court: At this time, I would like to say this to the Press.

I can't control them and I don't intend to, but I hope the Press doesn't print this until this trial is over. We have had enough Motions on too much publicity, and I can't control the Press, but it will be an aid in trying this case, if you don't print that where the Smith County jurors can read it, [fol. 1105] as well as others over Texas. Any other news media that might pick it up and read it. I mean all of you, radio and television.

Reporter's Note: I am presuming this is Defendant's Exhibit 27, which is a card reference to running Billie Sol Estes for Governor, but I have no positive identification of the offer by number: Same is being included with the other original exhibits.

Mr. Saunders: In support of the Motion now, if the Court please, we would like to offer some testimony, three witnesses here in the room, and you might swear them and put them under the rule.

The Court: Will you have them stand?

Mr. Saunders: Mr. Bennie Beaird, Mr. Kenneth King and Mr. A. J. Heaton.

[fol. 1106] KENNETH KING, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination:

By Mr. Saunders:

Q. State your name to the Court, please.

A. Kenneth King.

Q. Mr. King, where do you live?

A. I live in Tyler.

Q. How long have you lived in Tyler and Smith County?

A. I have lived here nine years.

Q. What profession or vocation do you follow, Mr. King?

A. Attorney-At-Law.

Q. How long have you practiced law in Tyler?

A. That same period, nine years.

Q. Do you know Mr. Billie Sol Estes, the Defendant in this case, personally?

A. No.

Q. Have you read anything about the case in which he is involved as Defendant?

A. Yes, on many occasions.

Q. Have you heard TV programs or news media on TV [fol. 1107] describing Mr. Billie Sol Estes and this case now on trial?

A. I have seen some television news items regarding some of his activities.

Q. Have you heard any discussions here in Tyler and Smith County, Texas, among the various people in connection with this case that is coming up for trial?

A. Yes, on several occasions.

Q. From what you have read, heard or seen, do you have an opinion whether or not Billie Sol Estes can receive a fair and impartial jury at this time in Smith County?

A. I have an opinion, yes.

Q. Will you please state that opinion?

A. It is my opinion that the prospective jurors in this County have already made up their minds as to the guilt or innocence of this Defendant.

Q. Then, I take it that you are stating that it is your opinion that he could not receive a fair and impartial jury trial in Smith County at this time?

A. That is my opinion.

[fol. 1108] Mr. Saunders: Pass the witness.

Cross examination.

By Mr. McGowen:

Q. Mr. King, are you familiar with the facts of this particular case?

A. No, I am not.

Q. Do you know what he is charged with in this case, being No. 16,818?

A. No, I do not.

Q. Do you know of anybody who does, amongst all of these prejudiced people that you have been talking to in your nine years in Smith County?

A. From the extent of my conversations with these people that I have talked to, not in nine years, but the past several months regarding this case, none of them knew what he was charged with but they all had an opinion as to whether he was guilty or innocent of a crime.

By the Court:

Q. Did they say they had an opinion of this one, that they didn't know anything about?

A. They indicated that they had made up their mind as to his guilt or innocence in the trial to be held here in Tyler.

Q. They didn't say whether or not some one had told [fol. 1109] them what the facts were or the purported facts of the case?

A. Not particularly, Your Honor. Most of them were basing their statements on what they had heard from television programs and read in the newspapers and heard on the radio regarding the trial.

Cross examination.

By Mr. McGowen:

Q. Have you heard anything from TV station or on radio and in the newspapers about the facts of this case, Mr. King?

A. I have seen myself some things that purport to be the facts in this case.

Q. What do you know about this case? You are an attorney here; you have read everything. Tell us about this case.

A. I know nothing about the case except what I read in the newspaper and on television.

Q. Now, have you read any facts or what are purported to be facts in the newspapers or on television?

A. Yes, I have heard something.

Q. What did you read?

A. I read in the newspaper that there are serial numbers [fol. 1110] on these fertilizer tanks have been changed or misplaced or altered in some manner, for one thing.

Q. Is he charged with changing serial numbers?

A. I don't know what he is charged with. I haven't read the indictment.

Q. And you have not seen it reproduced in newspapers either, have you?

A. No, I have not. I might further add that I have also read in the newspapers about the fictitious chattel mortgages and other items concerning fertilizer tanks.

Mr. Saunders: We have no further questions.

Mr. McGowen: Just one more question.

Q. You, yourself, do not know what the particular facts are supposed to be in this case nor have you talked with any resident of Smith County who does; is that correct?

A. I have talked to several people who think they know what the facts are.

Q. About this particular case?

A. Yes.

[fol. 1111] Q. Who is one of them?

A. Well, have talked to several of them. I could give you a pretty good list of names.

Q. All right, let's start out on them now.

A. Ralph Whitten.

Q. He knows what the facts are?

A. I didn't say he did.

Q. I thought you said he thought he did.

A. I said he thought he did.

Mr. Saunders: Your Honor, we object to counsel arguing with the witness and ask that he be instructed to give the

witness an opportunity to answer the questions as propounded.

The Court: All right.

A. He said he thought he did. All of these people say they thought they did. I don't know what they know. You understand that; and a former member of the jury panel, Jack Fite. I talked to a member who is coming up on the jury panel. I have also talked to Ennis Broussard. I have talked to Oscar Martin; several of them; lot more, Tom Moore. I could give you a pretty good list. It is the general discussion around coffee shops in this town.

Q. You have mentioned here about six or seven individuals.

A. Do you want me to keep going?

Q. You have not told me what facts they say they know. That is what I want to know. I don't doubt that you have talked to a lot of people, but what I am interested in, do they think they know whether the Defendant is innocent or guilty of this particular crime. I want to know if they know what the facts are.

A. I didn't debate it with them. All I know is that they stated to me they thought they knew what the facts were and they had an opinion as to his guilt or innocence.

Q. What is the population of Smith County?

A. I imagine close to a hundred thousand.

Q. And it is your opinion that just normal procedure, out of one hundred thousand people and people eligible for jury service, that you could not get a fair and impartial jury in this County; is that right?

A. That is my opinion, yes.

[fol. 1113] Mr. McGowen: That is all.

The Court: That is all, Mr. King.

BENNIE BEAIRD, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direction examination.

By Mr. Saunders:

Q. State your name to the Court, please, sir.

A. Bennie E. Beaird—B-e-a-i-r-d.

Q. Mr. Beaird, where do you live, please?

A. 1001 North Bois d'Arc.

Q. How long have you lived in Tyler or Smith County, Texas?

A. All my life with the exception of two years in World War I.

Q. Have you or not held any official position with the County of Smith in the past?

A. Yes. I was County Commissioner four years.

Q. Do you know the Defendant in this case, Mr. Billie Sol Estes?

A. I do not.

Q. Have you read anything about him in the newspapers [fol. 1114] recently?

A. Practically every day.

Q. Do you have a television set, Mr. Beaird?

A. I do.

Q. State whether or not you have seen the proceedings of this trial on September 24th, 1962, on your television screen.

A. I did.

Q. Do you own a radio, Mr. Beaird?

A. I do.

Q. State whether or not you have heard any comments, news or purportedly news of this trial and its proceedings prior to today.

A. Yes, I have.

Q. State whether or not you have, in your daily activities, heard this matter discussed by citizens of Smith County.

A. I have.

Q. Once or more than once?

A. Several times.

Q. From all of that discussion, from what you have read, seen or heard, do you at this time have an opinion as to whether or not Mr. Billie Sol Estes can secure a fair and [fol. 1115] impartial trial in Smith County at this time?

A. I would say it would be very difficult to get a jury—from conversations that I have heard among the people who have discussed it.

Q. By that, do you mean to say that it could not be possible but that you think it would be difficult?

A. It would be very difficult, I would say.

Q. Do you know whether or not, or are you willing to state that it would be improbable that a fair and impartial jury could be selected at this time?

A. I wouldn't say it would be impossible.

Q. The word used was improbable.

A. It probably could be.

Mr. Saunders: Pass the witness.

Cross examination.

By Mr. McGowen:

Q. Do you, yourself—

Mr. Saunders: Pardon me. May I ask one other question?

The Court: Go ahead.

Q. Do you know, yourself, Mr. Beaird, what Mr. Estes is [fol. 1116] charged with?

A. No, I do not.

By the Court:

He is talking about now the proof in this case.

Mr. Saunders:

Q. In this particular indictment.

A. The only thing I saw, it was four cases being transferred to this County and I don't know what he is going to be tried on, which one of them, or anything about it.

Q. Do you think that that makes any difference with reference to the opinion that you have and which you have expressed?

A. No, I wouldn't see where it would make any difference. If he is guilty on one, he might be guilty on the others, if you could prove it.

Q. In other words, your opinion is based upon the news media and not any specific charge for which he is not on trial?

A. That's right.

Mr. Saunders: Pass the witness.

Mr. McGowen: No questions.

[fol. 1117] The Court: May Mr. Beaird be excused?

Mr. McGowen: Yes, Your Honor.

The Court: You are excused from the rule, Mr. Beaird, and you may go back in the court room.

A. J. HEARON, witness called by Defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Saunders:

Q. State your name to the Court, please.

A. A. J. Hearon.

Q. Where do you live, Mr. Hearon?

A. Whitehouse.

Q. That is in Smith County?

A. Yes, sir.

Q. How long have you lived in that vicinity, Mr. Hearon?

A. All my life.

Q. Mr. Hearon, do you take any type of daily newspaper?
[fol. 1118] A. I do.

Q. Do you have a radio?

A. I do.

Q. In your home, I am speaking of. Do you also have a TV set?

A. Yes.

Q. Do you know the Defendant in this case, Mr. Billie Sol Estes?

A. I have met him on one occasion.

Q. Where did you meet him, Mr. Hearon?

A. In Pecos.

Q. At that time, did you have an opinion and so express it as to whether or not Billie Sol Estes could receive a fair and impartial trial in Smith County, Texas?

A. I did.

Q. What was that opinion?

A. Well, I figured that he would have a pretty hard time getting a jury here in Smith County.

Q. Did you so express it in court at Pecos on that occasion?

A. I did.

Q. Since that occasion, the case has been transferred to [fol. 1119] Tyler, Smith County, Texas; is that correct?

A. Yes, sir.

Q. Have you read anything in the newspapers about this case since it was moved here?

A. Well, yes, several times.

Q. What about hearing it on radio? Do you have an occasion to hear anything about it on radio?

A. Heard it on TV and radio both.

Q. From what you have heard, read or seen, or heard any discussions on it, have you heard any discussions around Whitehouse, Mr. Hearon?

A. Well, quite a bit; small town, you know.

Q. From all of those sources, do you now have an opinion as to whether or not Billie Sol Estes can receive a fair and impartial trial in Smith County, Texas, at this time?

A. Well, I wouldn't think so because it would be a pretty good job to get a juror, as much publicity as has gone on.

Q. I take it your answer is that it is your opinion that he could not receive a fair and impartial—

[fol. 1120] Mr. Holcomb: That was not his answer. Your Honor.

The Court: Let him answer what his opinion is. What is your opinion in that regard, Mr. Hearon?

Mr. Saunders:

Q. What is your opinion in that regard at this time, Mr. Hearon?

A. Well, if any one sat on it, if he can read and write, he is going to know all about it; listening to radio or TV. If he can't read and write, he shouldn't be on the jury.

Mr. Saunders: Pass the witness.

Cross examination.

By Mr. McGowen:

Q. Mr. Hearon, I remember you out at Pecos—

A. Yes, sir.

Q. You came out there and testified back in the middle of July that the Defendant couldn't get a fair trial in Smith County—

A. That's right.

Q. —and I asked you then if you knew what he was charged with and you didn't know. Do you know now?
[fol. 1121] A. No, not exactly.

Mr. McGowen: No further questions.

Redirect examination.

By Mr. Saunders:

Q. Has your opinion been strengthened or lessened since you testified in Pecos?

A. Well, it has been strengthened. There's been so much publicity about it.

Mr. Saunders: That is all. Thank you, Mr. Hearon. No further questions.

Recross examination.

By Mr. McGowen:

Q. You still don't know what he is charged with?

A. No. I have read so much, I don't know what he is charged with.

Redirect examination.

By Mr. Saunders:

Q. Would it make any difference to you, whatever he is charged with, so far as your opinion is concerned?

A. I wouldn't think so.

The Court: May he be excused from the rule?

Mr. Saunders: Yes, sir. You may sit in the court room if you like.

[fol. 1122] Mr. Saunders: We have no further witnesses in support of the Motion, Your Honor.

OFFER IN EVIDENCE

Mr. Hume Cofer: We have one other exhibit, Your Honor, today's issue of Tyler Courier Times, front section, concerning coverage today, that is out on the news stands today in Tyler with jurors still at large. We offer that as Defendant's Exhibit 26.

Reporter's Note: This exhibit as above identified is being forwarded as an original exhibit with this Statement of Facts.

Mr. Holcomb: Let the record reflect, Your Honor, that the State's Controverting Affidavit to Defendant's Motion has been filed.

The Court: It is filed and before the Court.

Mr. Hume Cofer: That concludes the testimony on the Motion, Your Honor, and we submit the Motion to the Court.

[fol. 1123]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Now, let me point this out. Now, the State has filed a Controverting Affidavit as stated there, and this is the second Motion. You take the position that it is the first Motion. Now, the record needs to be clear for some Appellate Court, if it gets that far, so they can know whether it is or not.

I think the best way to do that is to put in the record your first application was filed last September—and the style.

Mr. John D. Cofer: That is considered the original, Your Honor.

The Court: Is it attached?

Mr. John D. Cofer: We refer to it as an exhibit attached to it.

Mr. Hume Cofer: We ask leave to attach that document the Court is holding in his hand, that document itself, to Defendant's application.

The Court: That will be a part of that.

Mr. Hume Cofer: Yes, sir.

[fol. 1124] The Court: That is the only way I know to get the facts before them, because on September 25th, the Court overruled your Motion pertaining to so much publicity that he couldn't get a fair trial at that time, and granting your Motion for absent witnesses. I want the record to show that and they can be the judges of whether it is the first or second.

Mr. John D. Cofer: So far as witnesses were concerned, that was our first, but when the Court overruled us and didn't grant a continuance on the point of publicity, we have never had a continuance on that, Your Honor, and this is a renewal of that part of our first application. The facts are there.

The Court: I just want to be sure the facts are in there and let some other Court, if necessary, pass on whether or not it is the first or second.

Is that all now for all of you on this Motion?

[fol. 1125] Mr. Holcomb: The State has nothing further to offer, Your Honor.

Mr. John D. Cofer: Your Honor, maybe we could make some progress here. You know these things escape my mind. The original indictment—what I was going to say, we might save some time here.

Your Honor at this time—

The Court: Are we still talking on this Motion?

Mr. John D. Cofer: No, sir.

The Court: Let's dispose of that. The Court overrules the Motion for continuance at this time.

Mr. John D. Cofer: To which we except.

Before we start selecting a jury,—we have no further motions at this time, Your Honor.

So, since the Court has overruled our Motions, subject to those Motions, we will be ready to start selecting a jury.

[fol. 1126]

MOTION TO REQUIRE STATE TO ELECT COUNT AND MOTION TO EXAMINE JURORS INDIVIDUALLY AND RULINGS THEREON

Now, before we start selecting the jury, though, we would like to ask at this time that the State be required to elect on which count they expect to stand in this four-count indictment so that we may know, in interrogating the jury, to tell the jury of what offense he is accused. Now, that is necessary because the indictment reflects that it is not based on the same facts and evidence, and it is an effort to allege he is guilty of swindling; he is guilty of theft; he is guilty of embezzlement, and then he is guilty of embezzling or stealing—embezzling, I believe that is theft by bailee, of some entirely different property other than the ones they are relying on in the first three counts.

Under those circumstances, we are entitled to interrogate these jurors, from the standpoint of the defense, on which the State expects to try and offer evidence; and they are bound to know by this time what their evidence is and what they expect to rely on; they will be in no better shape at a later time to make the election as to which count, and we [fol. 1127] ask that they be required to elect because we cannot safely and adequately examine the jury without knowing what offense we are to answer.

Mr. McGowen: Your Honor, the State feels that now is not the time they should have to elect. We have authorities for Your Honor, didn't dream we would reach that point and would be arguing about election at this point. Our position, Your Honor, is that now is not the time for election.

Mr. John D. Cofer: We do not care to argue it, Your Honor.

The Court: I will withhold my ruling on it until you—I see your authorities on it. The Court will rule before you start the interrogation of the jury.

Mr. John D. Cofer: Now, Your Honor, we are not going to oppose the examination of these jurors individually and separate and apart from each other. We want to make that

clear. We make the request that we be permitted to make [fol. 1128] the examination of each juror individually and separate and apart from each other.

Mr. McGowen: Your Honor, our position is, this is a felony case like any other felony case and the rules do not envision a separate examination of the jury panel. It is discretionary with the Court and we feel that the normal provisions—this is just another felony case.

Mr. John D. Cofer: It has been held in Federal Court, Your Honor. I do not have any Texas authorities on it now but where the matter of publicity is involved, such as in this case, will be glad to give it to Your Honor, where it has been held error and the case reversed for no reason except the Court did not permit separate interrogation of the jury, individually. I will state to Your Honor that Judge Starley attempted to examine the jury en masse and it was the result of that manner of examination that made it impossible to get a jury—

Mr. McGowen: Your Honor, I would like to object to that.

[fol. 1129] The Court: Just a minute. Let him finish, then I will hear you.

Mr. John D. Cofer: We attempted it for about three days and it became apparent that jurors learned the answers after the first two jurors, and that after that, they all gave the same answers and then we would have to call them up separately; almost every juror was called up separately to the Bench and interrogated separately. Then we began weeding some of them out, but it became obvious to the Court and obvious to all parties that that jury was finally relieved and disqualified, but there wasn't anybody there that was fair and impartial on that jury panel; and as a result of the manner in which the interrogation had to be carried on in order to weed out those people. There were people in Pecos trying to get on there to convict the Defendant and people trying to get on there to acquit him, and by the time—these people hearing the answers and the manner in which we had to argue with those jurors in order [fol. 1130] to disqualify some of them made it absolutely impossible for the rest of the jury to constitute a fair and

impartial panel; and for that reason, this case was transferred here, because of the manner in which that jury was selected. And it doesn't save any time, Your Honor, because you have to do it separately any way. You have to get up here and we don't have a fair opportunity to interrogate them where in order to disqualify some of these men and ask them the things that they know about, you have to give the disqualifying information to other jurors and tell them things that disqualify them themselves; and we say that the only method where we will ever be able to get a fair jury, aside from the fact that the Court of Appeals—I believe either the Second or Third Circuit, reversed a case even where the Court interrogated them, and attempted to qualify them. They said that that didn't mean the situation where there was publicity because the Defendant had the right individually, separate, all jurors and interrogate each juror about what he had read, what he had seen and the influence it had upon him.

[fol. 1131] As I say, the case was reversed and it has been accepted generally as the proper method in publicity cases of much less publicity than this, that separate interrogation is essential to due process.

The Court: I would like to have that authority, Mr. Cofer.

Mr. McGowen: Your Honor, I didn't mean to interrupt Mr. Cofer but Mr. Cofer made the statement concerning the reason why this case was transferred, that they couldn't get a jury, etc. I would just like to clear the record on that.

There were thirty-two qualified jurors present at the time Mr. Cofer made his Motion for continuance. He may attribute reasons to the Court and to people who were on the panel why they wanted this or that and may attempt to say that they did not answer the questions honestly and truthfully, but that is something not within his knowledge.

We feel the rules do not provide for separate interrogation of the jury panel in a non-capital case. We feel, however, that it will probably be discretionary with the Court. We don't feel too strongly about it, save for a question of time. It would be extremely more time-consuming, we feel.

Mr. Holcomb: Your Honor, the State would further state to the Court that unless and until the rules of criminal procedure, governed thereby, by Article 620, which provides for separate interrogation of prospective jurors, but there is no statutory authority as submitted by counsel for the Defendant or the State of Texas; nor does he claim to bring before the Court any authority in regard to the statutory or—Therefore, we suggest and request the Court to allow us, which is within the discretion of the Court, to examine the jurors as a panel, as in other ordinary felony cases.

The Court: I will pass on this in the morning.

Mr. McGowen: Your Honor, I would like to clarify the [fol. 1133] State's position: 1. If Your Honor feels the ends of justice require it, we want a just and fair trial, but we submit to the Court that it is unusual and it is not provided for in the rules. We don't want to run into a problem either way we go.

The Court: I want to read your authorities and see what I find.

Mr. John D. Cofer: In the first place, Your Honor, that is the cardinal of criminal rules.

In the second place, there is a statute that provides that it must be done in capital cases.

I am sure that Your Honor this morning, in session, when saying that you were trying this case under the Constitution of the State of Texas did not mean that you were eliminating the constitution of the United States. It is a matter of due process; it is a matter of the Federal laws and the right of the Defendant to a fair and impartial trial, guaranteed to him under the Fourteenth Amendment of the United States; and this case holds, under the Four- [fol. 1134] teenth Amendment, that the person is entitled to the right to examine the jury separately and apart. I asked them to get that authority and believe he has gone to get it. It is directly in point and reversed for that reason.

The Court: I am very mindful that the United States Supreme Court some times sets aside some of our laws, but they have not yet overruled the Bill of Rights that I was speaking on this morning.

Mr. John D. Cofer: The Bill of Rights is what I had in mind, Your Honor. That the Fourteenth Amendment guarantees, says that no State shall deprive a citizen of the United States of his Bill of Rights. That's about what it means.

The Court: But they have never held, that I have any authority, that Section 10, the Bill of Rights, prevents the [fol. 1135] Defendant from having a fair trial. That is what I am getting at. If they have, I have not seen that decision.

Mr. John D. Cofer: I am not sure I follow you, Your Honor. I don't think the Bill of Rights prevents the Defendant from having a fair trial; it guarantees to him that right.

The Court: I have not seen these cases overruled by the Court of Criminal Appeals yet.

Mr. John D. Cofer: And to deny him the right of a fair trial denies him a Federal right.

We make the request now, Your Honor, urging at this early time, even before the plea of the Defendant to the indictment, we present this Federal right of due process and ask that the Court permit this examination to insure a fair and impartial trial, guaranteed not only by the constitution of Texas and the Bill of Rights of our State, but by the constitution of the United States and Amendment to the United States constitution.

[fol. 1136] The Court: Let me ask you this: Was this case concerning the preparation of the jury when being selected to try the case or preparation of the jury panel in their interrogation for testing their qualifications?

Mr. John D. Cofer: They were selecting the jury to try the case. They had selected it and the Court said that they should have selected them separately. They tried to convict him and it was reversed because the jury was not examined separately from each other.

The Court: Is that all?

Mr. McGowen: Yes, sir.

Mr. John D. Cofer: Your Honor, ordinarily, the matter of examining the jurors except in capital cases is a matter for the discretion of the Court. The question of examining

them in ordinary cases separate and apart would only arise in exceptional cases where the matter of publicity is involved. Now, as, do you know Mr. So and So, about the fact that there were three other men who were involved [fol. 1137] with the Defendant in this matter under which he is being tried today and they say yes. Then did you read what happened to them in El Paso and they say yes; then under Williams versus State, a Texas case, those men are disqualified to serve on the jury because they have obtained the information outside of the court room to which they are not entitled to receive. That is, these men got ten years and a big fine. That information is not admissible; and so if you find a juror that says yes he knew that; he is disqualified. You can't get that information from him by general questioning. He will not speak up because he figures that is improper.

And you will remember that Judge Morrison in reversing the Williams case reversed it because there were five men on the jury who had read a paper; they didn't say that they knew but they had read a paper in which paper it was shown—it was stated that in a former trial, that man had gotten a five or six-year sentence—this same defendant.

[fol. 1138] The Court: Could you give me that authority?

Mr. John D. Cofer: Yes, sir. I some times have trouble finding it. One time at Eagle Pass I had to get on the telephone and call another counsel out of town. But I think I laid it out here the other day. Williams versus State 284 SW. 2nd, the page (quits). When I was out at Pecos, I had to 'phone for it. If that is the wrong volume, Your Honor, I will find it for Your Honor by in the morning.

The Court: I have read quite a few authorities but I don't remember that case. I don't recall that I have read it.

Mr. John D. Cofer: I believe it is 284 SW. 2nd.

The Court: I will keep this until in the morning.

Court will recess until nine in the morning.

Tuesday 9:00 A.M. Oct. 23, 1962

Reporter's Note: Jury list is called by the Clerk, and [fol. 1139] by excuses; either legal or by agreement of counsel with the approval of the Court, the panel is reduced to a total number of 86.

The Court: Ladies and Gentlemen, there is one Motion pending and I want to read some authorities before I pass on it; so I am going to excuse you for one hour. You can get your time from the clock up here and report back to the court room within one hour. You are excused until then.

10:35 A. M.

The Court: Gentlemen, I am going to overrule the Motion requiring the State to elect at this time.

Mr. John D. Cofer: To which we except, Your Honor, and we will prepare a Bill.

The Court: I am going to grant the Motion, Defendant's Motion to interrogate the jury separately.

Reporter's Note: The above rulings were made while the Clerk was preparing the jury list of eighty-seven.

[fol. 1140] The Court: Ladies and Gentlemen of the Jury Panel, you will be sitting outside of the court room to be called in one at the time and interrogated by the lawyers concerning your qualifications as a juror in this case.

Do not discuss this case with any one, not even among yourselves, and don't let any one else talk to you about it. If there is any discussion around you about this case, you move on where you cannot hear it. If any one attempts to talk to you about this case at all, you tell them that you are a juror in this case and the Court has instructed you not to talk to them; and if they persist in talking or trying to talk to you, you inform the Court immediately as to who they are and the Court will take the proper action so that you will not be bothered any more with that particular party or parties.

We are going to try to accommodate you as much as we can, as we get organized here. We may be able to let those that are a good ways down the line go for a few hours and [fol. 1141] not stay close to the court room all of the time; and the bailiff will notify you from time to time what arrangements the Court can make.

Remember these instructions now; and when you are out in the hall or wherever you are, don't talk about this case or let any one talk to you. I will also instruct you not to read any more accounts of this case or listen to them on any broadcast. You should not know anything about this

case; particularly from this point on. What you have already learned, there is nothing the Court can do about it, but from this point on, you should not learn anything else about this case except what you will hear here from the witness stand, if you should become one of the twelve on this jury: After all, that is what your verdict shall be based upon, is the evidence you hear from the witness stand and be governed by the law and the Charge the Court will give you; and those two things alone are what you, as a juror, will have to decide this case on. So that is the reason I don't want you to read any more concerning this case or listen to any commentators or broadcasts or telecast about [fol. 1142] it.

So all of the jurors now report outside of the court room and remain out there until I can get organized and maybe let some of you go for awhile. Do not come back into the court room until you are called in as a juror, at any time.

Mr. John D. Cofer: Your Honor, we object to any photographs of the proceedings and the interrogation of the jurors, either by cameras or by newsreel, television or by radio—transcriptions or still pictures.

[fol. 1143]

FURTHER RULING ON DEFENDANT'S MOTION TO
BAN CAMERAS, ETC.

The Court: I am overruling the Defendant's Motion on banning the cameras, TV and radio but with this exception: From this point on television by the Court is ordered not to have any more sound; only film will be allowed from here until all of the testimony in this case is over. The same applies to radio from this point on and there will be no tape of the proceedings of the interrogation of the jury or the taking of the testimony and evidence here. That will apply to—until all of the testimony is in and any further [fol. 1144] orders of the Court will be given you at that time.

Mr. John D. Cofer: To which we except in so far as the ruling was against us.

Mr. Hume Cofer: Excuse me, Your Honor; I am not sure the record reflects our exception, to the Court's ruling as to cameras, etc.

The Court: Note their exceptions.

The Court: Are you gentlemen ready for the first juror?

Mr. Holcomb: May, we proceed, Your Honor?

The Court: Go right ahead.

[fol. 1145] OFFERS IN EVIDENCE

Mr. McGowen: Your Honor, may we get these other pictures in, showing the modification of the booth?

Mr. John D. Cofer: I didn't see them but I don't object to them.

The Court: Let the record show these exhibits are being offered in connection with the Motion heretofore presented [fol. 1146] to the Court by the Defendant to ban cameras of all kinds and broadcasting and telecasting, etc.

Mr. McGowen: Your Honor, State's Exhibit #7, photograph taken from behind the Judge's Bench towards the rear of the court room.

State's Exhibit #8, photograph taken from the jury box towards the rear of the court room.

State's Exhibit #9, photograph taken from the witness stand towards the rear of the court room.

State's Exhibit #10, photograph taken from the jury box towards the rear of the court room.

State's Exhibit #11, photograph taken from behind the Judge's Bench towards the rear of the court room.

State's Exhibit #12, photograph taken from the witness stand towards the rear of the court room.

The Court: Your record shows the juror is not on the stand, Mrs. Mehearg?

[fol. 1147] Mrs. Mehearg: My record shows the juror retired, when you sent him out.

The Court: Mr. Holcomb wanted to make sure you show the juror not in the court room at this time.

Mr. Hume Cofer: Now, the Defendant offers Defendant's Exhibit #31, which is a photograph taken from the side of

the jury box, looking across the jury box to the Court Reporter's desk and the Court's Bench.

The Court: When was that taken?

Mr. Hume Cofer: It was taken on the 2nd of October—yesterday.

We offer it in connection with our Motion to exclude the cameras from the court room, the sound equipment and also in connection with our Motion for a continuance.

The Court: All right; and these others are offered for the same purpose as Mr. McGowen offered State's exhibits? [fol. 1148] Mr. McGowen: They depict the court room as it was this morning.

The Court: These are improvements or whatever you want to call it, made between five o'clock yesterday afternoon and nine o'clock this morning?

Mr. McGowen: Yes, sir.

Mr. Hume Cofer: Defendant's Exhibit 30, photograph taken on October 22nd of the camera booth of the front side of the camera booth, at the back of the court room.

Defendant's 29 is a photograph taken from the end of the camera booth, looking into the camera booth on October 22nd, taken at the back of the court room, looking into the camera booth, and Defendant's Exhibit 28 is a photograph taken from the same place, at the end of the camera booth, at a recess when no one in the camera booth, showing the inside of and the back side of the structure at the back of the court room. That was taken on October 22nd; and the [fol. 1149] Defendant offers Exhibits 28, 29, 30 and 31 on, and in support of both of its Motions; Motion concerning the cameras and the Motion for continuance.

The Court: Court will recess until 9:00 o'clock in the morning.

Reporter's Note: State's Exhibits 7 through 12, photographs are being forwarded as original exhibits; and Defendant's Exhibits 28 through 31, photographs, are, being forwarded as original exhibits and are a part of this Statement of Facts.

[fol. 1150]

IN THE 7TH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

STATEMENT OF FACTS—November 7, 1962

[File endorsement omitted]

[fol. 1151]

9:10 A. M. November 7, 1962

[fol. 1152] Mr. John D. Cofer: Your Honor, I understand that we have just two arguments, State will have two and the defense will have two; and Mr. Hume Cofer will make our first argument and I will make our second.

The Court: With just four of you, will two hours to the side be satisfactory? An hour to each?

OBJECTIONS TO TELEVISION AND PHOTOGRAPHS DURING
ARGUMENTS, ETC., AND COURT'S RULING THEREON

Mr. John D. Cofer: Yes, Your Honor, two hours will be satisfactory.

Now, Your Honor, we want to again object to television and photographs in the court room while the jury is sitting in the box.

We object to any pictures being taken while the argument is going on or while the jury is in the box.

We object to any television, live or simply pictures, and in the event the Court adheres to his announcement that has been made, we want to except to it. Then we then want to make a special request, that the arguments for the two lawyers for the Defense not be photographed, or not be televised, live or not be photographed, and that no pictures [fol. 1153] be permitted to be taken while Mr. Hume Cofer and myself are making our arguments.

The Court: Overrule the first request, but now the last request is going to be granted, and I now order that while Mr. Hume Cofer and while Mr. John Cofer are addressing the jury, that the cameras not be on them and that all

sound be turned off; and there will be no press photographers' pictures made of either of those gentlemen while they are addressing the jury.

Otherwise, you may proceed, but for those two, follow that order of the Court.

Mr. John D. Cofer: Now, we except to the part of the Court's Order which overruled our first Motion.

The Court: Are you ready now for the jury, Gentlemen?

Mr. McGowen: Yes, sir.

The Court: Bring the jury in. (Prior to jury coming in)

Now, all the photographers, any pictures that you make, [fol. 1154] stay back at the back, in keeping with my order. It is all right to be seated where you are, but do not take any pictures from that position at all during the discussion of either side—from that position there.

If you have any pictures to make during the time I have told you that you could make pictures, go back to the back.

[fol. 1155] APPROVAL OF JUDGE PRESIDING (omitted in printing).

[fol. 1156]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

BILLIE SOL ESTES, Appellant,

v.

THE STATE OF TEXAS, Appellee.

Appeal from Smith County

OPINION—January 15, 1964

[fol. 1157] By bills of exception Nos. 5 and 6, appellant complains of the court's action in permitting live television

[fol. 1158] of the trial and insists that the manner in which he was subjected to such public dissemination of his trial throughout the nation, both in and out of the presence of the jury, denied him due process of law under the Constitution of this State and of the United States. It is contended that such action by the court required appellant to go to trial with the counsel of his choice, in violation of the ethical standards defined by Canon 35 of the American Bar Association, which seriously hampered counsel in the defense of appellant and denied to him full and adequate representation to which he was entitled under due process.

The bills of exception show that the case was first set for trial for September 24, 1962. On September 24 and 25, a hearing was held by the court on two motions filed by appellant. One motion was that no telecasting of the trial be permitted and the other was for a continuance. At the hearing, the court permitted live telecasting of the proceedings.

At the conclusion of the hearing, the court overruled appellant's motion that the trial not be telecast but granted the motion for continuance and reset the trial for October 22, 1962. On October 22, 1962, the case proceeded to trial on its merits.

Prior to the trial a booth was constructed and placed in the rear of the courtroom, painted the same color as the courtroom, with a small opening across the top for the use of cameras. During the trial, the court permitted telecasting of the proceedings by ABC, NBC, and CBS networks [fol. 1159] and KRLD television in Tyler, from the booth in the rear of the courtroom. Such telecasting was on film, without sound. The court did not permit telecasting in the hallway leading into the courtroom or on the second floor of the courthouse, where the courtroom was situated, in order that appellant and his attorneys would not be molested or harrassed in approaching and leaving the courtroom. No live telecasting of the proceedings was permitted by the court except the arguments of state's counsel and the return of the jury's verdict and its acceptance by the court. The arguments of appellant's counsel were not telecast, as requested by them. The bills certify that no juror or witness requested that he not be televised.

Under the facts certified, we fail to perceive any injury to the appellant as a result of the telecasting of the proceedings.

Appellant did not testify or call any witnesses, so it can not be said that he or his witnesses were burdened by the presence of cameras. There is no intimation in the record that any juror or witness was embarrassed or humiliated by reason of the telecast.

In *Ray v. State*, 221 S. W. 2d 249, this court refused to speculate and presume injury to an accused where photographers took pictures of the defendant and the jury while the judge was out of the courtroom. [fol. 1160] In *Farrar v. State*, 277 S. W. 2d 114, this court refused to reverse a conviction because photographs were made of the appellant, his counsel, and the jury during the trial, in the absence of an objection *and showing of injury to appellant*.

The manner in which the trial judge permitted and controlled telecasting of the instant trial was well within the supervision and control of such coverage granted to him under Canon XXVIII of the Canons of Judicial Ethics since approved by the Judicial Section of the State Bar of Texas.

The contention that appellant was denied full and adequate representation, because of his counsel's belief in Canon 35 of the American Bar Association barring photographs in the courtroom or broadcasting or telecasting court proceedings, is not borne out by the record. Of the many cases coming to this court, we know of no case where the accused received better or more efficient representation than did appellant in the present case.

Dice, J.

[fol. 1161]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

No. 36,086

BILLIE SOL ESTES, Appellant,

vs.

THE STATE OF TEXAS, Appellee.

Appeal from Smith County

JUDGMENT—January 15, 1964

Opinion by Judge Dice.

Concurring Opinion Judge Morrison.

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

[fol. 1162]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

[Title omitted]

Appeal from the 7th Judicial District Court of Smith County, Texas.

APPELLANT'S MOTION FOR REHEARING—

Filed January 30, 1964

[File endorsement omitted]

J. Byron Saunders of Tyler, Texas, John P. Dennison of Pecos, Texas, Cofer, Cofer & Hearne of Austin, Texas, Attorneys for Appellant.

[fol. 1163]

VIII.

1. The Court of Criminal Appeals errs in sustaining live television of the trial of defendant, over his objection, as reflected by his Bills of Exceptions No. 5 and 6; and in violation of Canon 35, and of accepted standards of fair trial and judicial procedure, and of Judicial Ethics, as promulgated by the American Bar Association, and in requiring him and his counsel, over their objections, to submit to trial before live television, under the facts and circumstances of this case, and by so doing denying the defendant a fair trial, and equal protection of law, and due process of law under the XIV Amendment to the Constitution of the United States.

2. The Court of Criminal Appeals errs, in an "all out treatment" publicity case such as defendant's, in requiring him, over his objections, to submit to any procedural technique which does not in some reasonable way contribute to the determination of his innocence or guilt, and which is calculated to any extent to interfering with a fair trial, and to commercialize and exploit him and the circumstances under which he is held to answer before the bar of Justice, and to so hold, denies the defendant equal pro-

tection of the law, and due process of law under the XIV Amendment to the Constitution of the United States.

3. The Court of Criminal Appeals errs in sustaining the trial court's permission for live telecast of the defendant's trial, over his objections, and in holding that the defendant had no rights, if the State's Counsel did not object, and if "no juror or witness" objected; because the purpose of defendant's trial was not to please and put on display the State's attorneys, the State's witnesses, and the members of the jury; and the trial as conducted denied defendant a fair trial, and equal protection of the law, and due process of law under the XIV Amendment to the Constitution of the United States.

4. The Court of Criminal Appeals errs in upholding live television of defendant's trial, under the provisions of Canon XXVIII of the Canons of Judicial Ethics, approved [fol. 1164] since defendant's trial by the Judicial Section of the State Bar of Texas, and says that the enforcement of such rule by the integrated Bar of Texas, a State agency, and by the District Court of Smith County, Texas, and by this Court, is unreasonable and arbitrary, and said State Canon is discriminatory and is not uniform in its application; in that it leaves to the trial court the determination, without defendant's consent, in which case a defendant shall be subjected to television exploitation of his trial, and as applied in this case, denies this defendant the rights given to a less "news-worthy" defendant; and denied him the equal protection of the law, and due process of law under the XIV Amendment to the Constitution of the United States.

5. The Court of Criminal Appeals errs in applying Canon XXVIII of the Canons of Judicial Ethics of the Judicial Section of the Integrated Bar of Texas, a state agency, because in permitting each judge to determine whether a defendant's trial shall be telecast, and in this case permitting the trial judge to enforce such a rule against this defendant, there is no uniform standard of reasonableness established for the application of such canon and rule, nor is it provided in said canon and rule

that no judge shall administer the same, or exercise his discretion in such a way, as to unreasonably interfere with the defendant, and his counsel in defending his case, or with his obtaining a fair trial, or discriminate against a particular defendant; and said Canon as written, is not susceptible of uniform, fair and impartial application, and its application by this Court, and by the District Judge, and by the Judicial Section of the Integrated Bar of Texas, and sustained by this Court, denies defendant the equal protection of the law, and due process of law under the XIV Amendment to the Constitution of the United States.

This appellant does not wish to further argue the proposition as to live television as an arm to the Judicial process, and the fair and impartial administration of Justice. It has been fully argued in Volume I, paragraph VI of his Brief on Original Submission. Nothing has changed the situation since that brief was written, except for two things:

[fol. 1165] (1) The trial judge has, *ex post factorially*, secured the official sanction (approval) of his procedure, extra-judicially, by his fellow Judges, in the Judicial Section, of the State Bar of Texas. There is no record of any defendant or practicing lawyer participating.

(2) Then, more recently, the application of Texas Canon XXVIII, of Judicial Ethics, by the administrative officers of the Judicial branch of our State government, has resulted in television's, and news-happy political officials', greatest, though hardly their finest, hour. As cameras whirled, and public officers "mugged", a man accused of murder in this State, as millions watched, was publicly lynched, in vindication of our Texas Judicial Section's guarantee of the Public's right to look, see, and witness the immolation of their fellow man.

"Lee Harvey Oswald and The Law"—"Could Lee Harvey Oswald Have Obtained a Fair Trial?" My eminent opposing Counsel, the Attorney General for this Court, appeared recently upon a nationwide hook-up and advanced the doctrine, and ably upheld the position, to be applied to famous crimes, and to those "whom there is no doubt of their guilt"; *that those so accused are entitled to no fairer trial than they can get.*

This rule of Justice, we suppose is for "some noted culprit, on whom the sentence of a legal tribunal had but confirmed the verdict of public sentiment". Hawthorne, *"The Scarlet Letter"*, Chap. II, p. 49, Centenary Edition.

No one can know whether "Lee Harvey Oswald" could have gotten a fair trial. He did not get one, and now cannot; nor will any presumption of innocence hallow his Eternity. As lawyers, our answer is a simple one.

Lee Harvey Oswald could have gotten a fair trial, because our Federal and State Constitutions have guaranteed him that, and our confidence, as lawyers at the bar, is that this Court, and the Supreme Court, would have seen that he did. That is not the question!

[fol. 1166] The question is:

Could the State of Texas, according to the accused equal protection of the law and due process of law; in light of what occurred, have secured a conviction of Lee Harvey Oswald?

Do we who are officers of the Court really want to abandon such sensationalism?

Against the great concrete interests in the extravaganza of the "flood-lights", the press, the television industry, public relation experts, publicity-seeking officers, and attorneys for prosecution and defense, stand only the rights of the lone defendant seeking a fair trial, and the state's interest in the dignity and impartiality of its courts.

Canon 35 of the American Bar Association, is a uniform rule, applied without discrimination. Only two States, we are told, do not adhere to it.

It is of some significance that the "saga of Lee Harvey Oswald" was to end in one of those States. It could have only occurred in a State where public officers made arrests and arraignments under compact with news media, and men are tried and condemned under Treaty between Judge and "hucksters".

[fol. 1167]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

BILLIE SOL ESTES, Appellant,

v.

THE STATE OF TEXAS, Appellee.

Appeal from Smith County

OPINION ON APPELLANT'S MOTION FOR REHEARING—
March 11, 1964

[fol. 1168] The appellant forcefully argues in favor of Canon 35, Canons of Judicial Ethics of the American Bar Association, and against the view that the supervision and control of broadcasting or televising of court proceedings shall be left to the trial judge who has the inherent power to exclude or control such coverage.

We are not called upon to pass upon the merits of Canon 35. It is not binding upon the courts of this state.

We remain convinced that the coverage of appellant's trial in the manner set out in our original opinion was not a violation of due process and equal protection of law or other constitutional safeguard.

Woodley, Presiding Judge

[fol. 1169]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

[Title omitted]

Appeal from Smith County

MINUTE ENTRY OF ORDER OVERRULING MOTION
FOR REHEARING—March 11, 1964

This cause came on to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

[fol. 1170]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

[Title omitted]

Appeal from Smith County

MINUTE ENTRY OF ORDER OVERRULING SECOND MOTION
FOR REHEARING—April 15, 1964

No Written Opinion

This cause came on to be heard on Appellant's Second Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

[fol. 1171] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 1172]

SUPREME COURT OF THE UNITED STATES

No. 256—October Term, 1964

BILLIE SOL ESTES, Petitioner,

v.

TEXAS.

ORDER ALLOWING CERTIORARI—December 7, 1964

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted limited to Question 2 presented by the petition which reads as follows:

"Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.